(12)

No. 87-1555

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JAMES H. BURNLEY, IV, *et al.*,
Petitioners,

v.

RAILWAY LABOR EXECUTIVES ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICI CURIAE* OF THOMAS COLLEY, ANN K. FINKBEINER, DENISE R. EVANS, ANNE B. LACKMAN, HAROLD LACKMAN, ERNEST H. BARRY, JR., ANNA KAMOLA, ARTHUR W. JOHNSON, ANNE H. JOHNSON, ROGER A. HORN, SUSAN HORN, MARY F. CLAY, HARRY BAUER, AND LORE BAUER IN SUPPORT OF PETITIONERS

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This brief *amici curiae* is filed by Thomas Colley, Ann K. Finkbeiner, Denise R. Evans, Anne B. Lackman, Harold Lackman, Ernest H. Barry, Jr., Anna Kamola, Arthur W. Johnson, Anne H. Johnson, Roger A. Horn, Susan Horn, Mary F. Clay, Harry Bauer, and Lore Bauer in support of petitioners.[1]

INTEREST OF THE *AMICI CURIAE*

Amici are survivors of some of the sixteen persons who were killed on January 4, 1987 outside Baltimore, Maryland when a Conrail locomotive driven by a

[1] Petitioners and respondents have consented to the filing of this brief; their letters to that effect have been lodged with the Clerk.

marijuana-smoking engineer and brakeman ran stop signals and proceeded into the path of an Amtrak passenger train *en route* from Washington, D.C. to Boston.[2] The interest of the *amici* is in assuring that persons under the influence of drugs and alcohol not be permitted to operate or control trains, and that laws and regulations designed to take reasonable steps to prevent such unnecessary disasters not be struck down by judicial decisions, like the one of the United States Court of Appeals for the Ninth Circuit under review here, which fail to give adequate constitutional weight to the needs of public safety.

This brief emphasizes facts that document the prevalence and the consequences of drug use by railroad employees, and why it was reasonable for regulatory officials and railroads to conclude that drug testing is needed both to identify users and to ensure that such persons do not continue to have the lives of the public entrusted to them. *Amici* are only a handful of the general public of passengers who ought to be able to travel on public transportation without risk of such unreasonable and avoidable threats to their safety. *Amici* hope that in weighing the constitutional reasonableness of drug testing, this Court will recognize the legitimacy of efforts like the very minimal ones the court below nevertheless struck down here—efforts that are designed to make less likely that the pain and loss that *amici* live with as a result of irresponsible drug abuse by railroad employees will not be visited on other families whose members ride on passenger trains.

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[2] *Amici* have been plaintiffs in consolidated actions arising out of that collision pending in the United States District Court for the District of Maryland. *In re Rail Collision Near Chase, Maryland on January 4, 1987 Litigation*, MDL No. 728, D. Md. (1987). Counsel for *amici* were appointed by the District Court as lead counsel for the plaintiffs in those consolidated cases. Counsel for *amici* also represent persons injured in the 1988 collision near Chester, Pennsylvania referred to at pp. 12-13, *infra*. *Sala* v. *National Railroad Passenger Corp.*, No. 88-1572, U.S.D.C., E.D. Pa. (1988).

STATEMENT

Although superficially this case might appear a technical debate about abstractions of Fourth Amendment doctrine, it is not that at all. The real-world consequences of this Court's decision will quite literally affect issues of life and death. What this case really involves is not confined to policy directions of railroad corporations, or entries by governmental bodies in the *Federal Register*. Because of the pretrial discovery that occurred, one of the best documented instances of drug abuse by railroad employees and its effects is the collision last year in which *amici* lost members of their families. See J.A. 188-89. The facts that ought to be borne in mind in deciding this case include these:

On Sunday afternoon, January 4, 1987, at 12:35 p.m., the Amtrak *Colonial* left Union Station in Washington, D.C. After an intermediate stop in Baltimore, it was carrying approximately 650 passengers, many of them students returning to school and families traveling home after the holidays.

At 1:16 p.m. a train of three 136-ton Conrail locomotives left the Bayview Yard in Baltimore heading north on tracks that converged with the tracks used by Amtrak passenger trains in the busy Northeast Rail Corridor.

The Conrail train was driven by engineer Ricky Lynn Gates. Assisting him in the cab was brakeman Edward "Butch" Cromwell. Both Gates, the engineer, and Cromwell, the brakeman, were longtime habitual abusers of drugs and alcohol. As they applied power to the lead locomotive, sometimes exceeding speed limits, Gates and Cromwell took "hits" on a joint of marijuana, ignored signals, and watched the scenery. Although their duties required them to call out the wayside signals along the route, soon after leaving the yard they ceased to do so. As the engineer recalled the fatal trip:

> Q. . . . What did you do when Mr. Cromwell pulled out the marijuana cigarette at about River?

A. He asked me if I wanted to smoke it then, and I told him it was his, it was up to him, that I would prefer if we were going to smoke anything, to wait until we got on the Port Road branch. . . .

* * * *

A. The next thing I remember, we were still talking, I don't remember the exact nature of the conversation, we were still in the nature of complaining about the engines and him telling me something about the trip before then and his brother or something. And he put what was left of the joint into a pipe and he started lighting it up.

Q. At that point you had three hits on the joint?

A. I believe so, yes.

Q. And then he put the remains of the joint into a pipe; is that correct?

A. Yes.

Q. What did he do with that?

A. He lit it up. He passed it to me at one point, but it had gone out, and I could—I don't recall whether I either tasted it before I tried to light it, or I just smelled it, but I could smell the remnants of PCP in the pipe. And I handed it back to him more or less I was agitated about it, and I mentioned it to him, and he told me it was his girlfriend's pipe and she had probably smoked it.

Q. Does PCP have an odor?

A. Yes, like parsley flakes. That was the only experience I had ever had with it years before, and that is what it smelled like, and so that's what I assume it was.

* * * *

Next thing I recall is through the conversation, I was running assuming we were going to go out or keep moving at Gunpow Interlocking, and I was trying to make, save as much time as I could, I pulled the throttle out a little more is the last thing I remember.

* * * *

I know I was talking to Butch, I glanced at him. . . . I probably glanced at the speed indicator at some point, the scenery around me and the signal. I was taking in quite a bit. (Pp. 25a-27a, *infra.*)

They continued at a speed in excess of 60 miles per hour, and ignored the wayside directions over nine miles. Neither Gates nor Cromwell was paying attention as the train ran through a series of SLOW and then STOP signals approaching the convergence with the track being used by the Amtrak passenger train at Chase, Maryland, just north of Baltimore.

At 1:30 p.m., Gates at last noticed what was happening. Cromwell jumped from the train. Gates in panic hit the emergency brakes, and tried to reverse the locomotives. But the Conrail train slid through the STOP signal and into the path of the Amtrak passenger train, which was approaching from behind at more than 100 miles per hour. P. 27a, *infra.* The impact was described by emergency callers as a "big explosion." P. 16a, *infra.* The National Transportation Safety Board found that

> The rear Conrail unit was virtually disintegrated . . . .
>
> The forward cab and superstructure of the lead Amtrak locomotive unit was crushed downward and inward to the underframe. Separated from the trucks, the remains of the car body came to rest west of the tracks about 400 feet north of the collision point. . . .
>
> . . . After passing over the food service car, the second car came to rest on its side atop the rear of the trailing Amtrak locomotive unit. It was more or less perpendicular to the track, badly deformed and bent or crimped downward in the middle at an angle of about 30° . . . .

P. 5a, *infra.* The engineer of the Amtrak train and fifteen of its passengers—most of them children and young people—were killed. Pp. 1a-3a, *infra.* At least 174 other passengers were injured. P. 3a, *infra*, J.A. 188.

The National Transportation Safety Board after investigation and four days of hearings, in which thirty-three witnesses were heard, issued a determination

> that the probable cause of this accident was the failure, as a result of impairment from marijuana, of the engineer of Conrail train ENS-121 to stop his train in compliance with home signal 1N before it fouled the No. 2 track at Gunpow . . . .[3]

It further recommended that Conrail "[i]mprove the methods of identifying employees who abuse alcohol and/or drugs,"[4] and that the Federal Railroad Administration "[e]xpand and intensify its oversight of Amtrak's . . . compliance with Federal Safety Regulations (including the requirements for postaccident toxicological testing. . . ."[5] The Federal Railroad Administration observed that the collision "illustrates the catastrophic consequences that can occur when railroad employees responsible for passengers or hazardous materials are under the influence of drugs." 53 Fed. Reg. 16640, 16641 (1988).[6]

SUMMARY OF ARGUMENT

The regulations and policies that the unions challenge in this case were designed to help safeguard in a limited way—indeed, a not fully adequate way[7]—the public

[3] NATIONAL TRANSPORTATION SAFETY BOARD, RAILROAD ACCIDENT REPORT: REAR-END COLLISION OF AMTRAK PASSENGER TRAIN 94, THE COLONIAL, AND CONSOLIDATED RAIL CORPORATION FREIGHT TRAIN ENS-121, ON THE NORTHEAST CORRIDOR, CHASE, MARYLAND, JANUARY 4, 1987 (1988) (hereinafter cited as "NTSB Report"), pp. 23a-24a, *infra*.

[4] *Id.* at 24a.

[5] *Ibid.*

[6] Gates pleaded guilty to manslaughter. *State* v. *Gates*, No. 87-CR-2420, Circuit Court, Baltimore County, Maryland, February 16, 1988, p. 1a, *infra*. Thereafter he also pleaded guilty to obstructing the National Transportation Safety Board investigation by lying to investigators. *United States* v. *Gates*, No. R-88-116, D. Md. 1988.

[7] The Federal Railroad Administration on May 10 of this year issued a notice of proposed rulemaking that would establish a system of random drug tests for railroad employees. 53 Fed. Reg. 16640 (1988). *Amici* believe that the same overwhelming concerns of safety that provide constitutional support for the limited testing at issue here also amply support such random testing. Random

safety. They were adopted in response to well documented evidence, and findings by responsible governmental agencies, that drug and alcohol abuse by the employees who operate and direct locomotives and trains on this country's railroads constitutes a serious danger to the public. If not curtailed, drug and alcohol abuse by railroad employees will continue to cost lives and vast amounts of damage.[8]

Even if the Fourth Amendment is applicable to this testing program—and, for reasons stated at pp. 22-30, *infra*, *amici* submit that it is not—that Amendment in terms and by this Court's decisions prohibits only searches and seizures that are "unreasonable." *E.g.*, *O'Connor* v. *Ortega*, 107 S. Ct. 1492 (1987); *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985). The testing challenged here is not unreasonable. Indeed, given the hazards to the public and what is now established about drug and alcohol abuse by railroad employees, *e.g.*, J.A. 187-88, 193-203, any policy would be unreasonable and inexcusable that did *not* require drug testing. The decisions of the expert federal agency and the operating railroads to require such testing as one means of making such accidents less likely are am-

drug testing has been upheld on many occasions for employees on whom the safety of others depends. See, *e.g.*, *Rushton* v. *Nebraska Public Power Dist.*, 844 F.2d 562 (8th Cir. 1988) (employees at nuclear power plant). According to the experience of the military services, the fact of testing is in itself a significant deterrent to drug use. See Halloran, *Drug Use in Military Drops; Pervasive Testing Credited*, N.Y. Times, Apr. 23, 1987, p. A16, col. 1; *cf. Committee for GI Rights* v. *Callaway*, 518 F.2d 466, 476 (D.C. Cir. 1975). See also 53 Fed. Reg. 8368, 8386 (1988) (Federal Aviation Administration notice of proposed rulemaking to require post-accident drug testing). The record here supports the same conclusion. J.A. 189.

[8] The monetary cost of the damage the regulations and policies seek to avoid is also gigantic. Apart from what the National Transportation Safety Board estimated as $16,561,000 damage to vehicles and railroad property, p. 7a, *infra*, as a result of the single collision referred to, Conrail made settlement payments exceeding $58 million to wrongful-death claimants and $6 million to others; a number of additional damage claims are unsettled and pending.

ply supported by vast and unfortunately recurring evidence, and wholly consistent with a practical and urgent need. The split decision of the Court of Appeals below, that invalidated both the federally required and the private sector safety rules on constitutional grounds, really amounts to an unauthorized judicial second-guessing of both agency policy and private discretion in a manner that this Court rejected in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The Court of Appeals majority gave dominant weight to what it called railroad operators' "legitimate expectations of privacy in the integrity of their bodies." Pet. Cert. 21a. But as this Court explained two months ago, "An expectation of privacy does not give rise to Fourth Amendment protection, however, unless society is prepared to accept that expectation as objectively reasonable." *California* v. *Greenwood*, 108 S. Ct. 1625, 1628 (1988). The absolutist privacy interest asserted by the unions here is not compatible with the rule of reason established by the text of the Fourth Amendment, and is not by any stretch "objectively reasonable."

Moreover, no one required the members of the respondent unions to accept the well paid and responsible jobs they hold. They voluntarily made that choice. Persons in occupations like theirs, who have the safety of the public thus entrusted to their care, cannot claim the same interest as others in preventing reasonable testing, in the employment context, designed to identify irresponsible and dangerous use of drugs and alcohol. And insofar as some of the challenged testing programs are merely optional, at the option of the private railroads (who are not even parties to this case), a Fourth Amendment challenge to those privately instituted programs must fail on familiar doctrine that the Constitution generally limits only governmental, and not private, action.

The "integrity of their bodies" of railroad employees, which the majority of the Court of Appeals envisioned

as being so dispositive here, weighs little against the interest in preserving the integrity of the bodies of passengers—and, indeed, fellow railroad workers—who are at risk of being killed or maimed as a result of drug and alcohol abuse by railroad employees. Nothing can bring back the members of *amici*'s families, who lost their lives to a train operated by a drug-abusing engineer and brakeman. This Court's decision should not block reasonable efforts either by railroads, or by other passenger and freight carriers, or by the Government to make it less likely that such senseless and avoidable bereavements occur again.

ARGUMENT

I. DRUG TESTING OF RAILROAD EMPLOYEES AND OTHERS ENTRUSTED WITH THE SAFETY OF THE PUBLIC IS NOT "UNREASONABLE" UNDER THE FOURTH AMENDMENT.

The Fourth Amendment is one of the most flexible provisions of the Constitution. Unlike other clauses of the Bill of Rights which speak at least textually in absolute terms, the Fourth Amendment was drafted from the beginning to make clear that the only searches and seizures it prohibits are those that, all things considered, and in the light of actual and present-day necessities and dangers, are "unreasonable." The Fourth Amendment sets forth a rule of reason and practicality. *O'Connor* v. *Ortega*, 107 S. Ct. 1492 (1987); *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985). "The Fourth Amendment prohibits only unreasonable searches, *Carroll* v. *United States*, 267 U.S. 132, 147 (1925) . . . ." *Bell* v. *Wolfish*, 441 U.S. 520, 558 (1979). "[T]he Fourth Amendment cannot be translated into a general constitutional 'right to privacy.'" *Katz* v. *United States*, 389 U.S. 347, 350 (1967).

A. The Public's Overwhelming Safety Interest Amply Justifies These Drug Tests.

A visitor from a far-away place surely could not help but be astounded at the Ninth Circuit's constitutional holding here. Two judges, constituting a majority of the

Court of Appeals panel, held that the United States Constitution forbids an employer, absent "particularized suspicion," to test for drugs employees who are entrusted with duties hazardous to themselves and others, in an environment of well-documented frequent use of drugs. *Even after two trains collide*, the majority below held, railroads may not enforce policies, and the Government may not enforce regulations, designed narrowly to determine whether the train operators used drugs. The Court of Appeals held this, moreover, while acknowledging that "The FRA undertook this rulemaking process in response to a perception that drug and alcohol abuse is a serious problem in the railroad industry posing unacceptable risks to public and employee safety." Pet. Cert. at 12a-13a.[9] The Ninth Circuit's holding lacks any precedent and is simply bizarre.

Exactly how reasonable such testing is, and exactly how disastrous drug use by railroad employees can be, is vividly demonstrated in the record of the train collision outside Baltimore last year in which *amici*'s children or relatives were killed. As the drug-using engineer, who survived the crash with minor injury, later testified:[10]

> Q. How frequently were you using marijuana at this point in time?
> A. Maybe once or twice a week.
> * * * *
> Q. For what period of time had you been using marijuana at this rate?
> A. Since about the age of 18.
> * * * *

[9] The Federal Railroad Administrator in 1983 found that "Alcohol impairment and drug impairment have been identified as causal or contributing factors in a number of train accidents and employee fatalities over the past ten years." 48 Fed. Reg. 30723 (1983); see also 50 Fed. Reg. 31508 (1985).

[10] The quoted testimony is from his deposition in consolidated civil actions arising out of the collision. *In re Rail Collision Near Chase, Maryland on January 4, 1987 Litigation*, MDL No. 728, U.S.D.C., D. Md.

> Again, I might add I am subject to blackouts under the influence of drugs and alcohol. (Pp. 28a-30a, *infra.*)

Such drug and alcohol abuse, both on and off the job, by these railroad employees and by railroad operators generally was nothing new or unique. The engineer testified:

> Q. Did you ever use marijuana or any other illegal drugs with any of your Conrail co-workers?
> A. Yes.
> Q. The answer is yes?
> A. Yes.
> Q. On how many occasions?
> A. I don't know.
> * * * *
> Q. How frequently did you use marijuana with your Conrail co-workers in 1986?
> A. I can't recall any—I don't know how to answer it as far as frequency goes, but it was a number of times.
> Q. More than ten?
> A. Probably.
> Q. More than 20?
> A. Maybe. (Pp. 29a-30a, *infra.*)

The brakeman testified that this was not the first time that he and the engineer had operated a locomotive while smoking marijuana. Pp. 31a-32a, *infra.*[11]

[11] The engineer also admitted constant abuse of alcohol:

> Q. What quantities were you normally drinking alcohol?
> A. Anywheres from a minimum of a six-pack a day to a case and a half, two cases a day.
> Q. A six-pack to a case or two cases a day; is that correct?
> A. Sometimes, yes.
> Q. And what was your average consumption? Was it closer to one case?
> A. Average consumption was close to a case, yes.
> MR. SARSFIELD: What was the answer to that? Average consumption was what?

[Continued]

Nor was this crash, which devastated sixteen families and caused pain and hardship for many others, an isolated event. The list since that time has grown steadily longer, and new drug-related railroad crashes have occurred even since *amici* filed their earlier brief in this Court three months ago. See generally J.A. 196-203. An incomplete sampling of some of the more publicized events includes these:

—On November 8, 1987, two Union Pacific freight trains collided head-on near Kemmerer, Wyoming after one of them ran a stop signal. A conductor was killed and six crew members injured. The front brakeman on the train that ran the signal tested positively for cocaine in his blood and urine. See J.A. 203.

—On January 29, 1988, near Chester, Pennsylvania, an Amtrak passenger train plowed into a railroad maintenance-of-way vehicle on the tracks ahead of it. At least nineteen persons were injured. The operator of the switch which should have stopped the train hid from authorities for three days; when he gave himself up and was tested, his urine still showed positive for use of four different drugs: marijuana, cocaine, methamphetamine, and amphetamine. See pp. 36a-38a, *infra*. The local district attorney announced that because of the delay before the tests could be administered, it was impossible to prove the timing of the usage in relation to the collison, and so no criminal charges would be filed.[12]

[11] [Continued]

A. Probably close to a case of beer a day.

Q. It was that pretty much every day?

A. Almost every day, yes.

Q. And by a case of beer, of course, we are referring to 24, 12-ounce cans of beer; is that correct?

A. Yes.

Q. For what period of time had you been consuming alcohol at that rate of almost a case a day, or over a case a day?

A. I would say for close to a year at that time.

Q. And during what times of day would you do your drinking?

A. Any time.

Q. What time of day would you start drinking?

A. Any time.

P. 28a, *infra*. The engineer testified to having once been sent to drive a locomotive when he said he was too drunk to drive an automobile. Pp. 33a-34a, *infra*.

—On April 6, 1988, a commuter train ran a stop signal and plowed into the back of another commuter train in Mount Vernon, New York. The body of the engineer, who was killed in the crash, showed traces of marijuana. In addition, three tower operators and the dispatcher in New York City showed traces of drugs when tested: amphetamines in the cases of two of the tower operators, marijuana for the third, and morphine and codeine for the dispatcher.[13]

—On May 21, 1988, two Conrail trains collided head-on in Fair Lawn, New Jersey. A brakeman on one of them was killed. A dispatcher had put both trains on the same track. He was tested for drugs and found positive for use of marijuana.[14]

—A week prior to that collision, the Federal Railroad Administrator had stated that since the crash in which *amici*'s children or relatives were killed,

> the nation's railroads experienced 37 accidents where one or more employees tested positive for drugs and four in which one or more employees tested positive for alcohol.
>
> Over the last 16 months, Mr. Riley said, "we've averaged one major rail accident every 10 days in which alcohol or drug abuse was discovered, with more than 375 people killed or injured in those accidents.

[12] See McCord, *Tower Operator Won't Be Tried in Amtrak Crash*, Baltimore Sun, April 14, 1988, p. 81, col. 2; Stevens, *24 Hurt as Amtrak Train Derails; Search is On for Railroad Worker*, N.Y. Times, Jan. 30, 1988, p. 1, col. 3.

[13] Feron, *5 Metro-North Workers in Crash Showed Drug Traces, U.S. Says*, N.Y. Times, May 11, 1988, p. A1, col. 1 (emphasis supplied).

[14] UPI dispatch, *Prosecutor Unsure on Conrail Dispatcher*, June 17, 1988.

> "We have found drug-positive results in one of every five railroad accidents we've tested in the last two years, and *65 percent of our fatalities occurred in accidents where one or more employees tested positive for alcohol or drugs.*" [15]

The Federal Railway Administration earlier this year reported:

> During the thirteen-month period January 1987 through January 1988, the nation's railroads experienced 41 accidents (including Chase, Maryland) in which one or more employees tested positive for alcohol or illegal drugs. Alcohol or drug use by one or more employees was detected in over 20% of qualifying events for post-accident testing. FRA believes that there are significant indications that alcohol or drug use played a causal or contributory role in 13 of these events, accounting for 19 fatalities, 220 injuries and $19,956,000 in property damage. Of the 13 events, illicit drug use was present in 10 and alcohol use in only 3, despite estimates at the time the current rule was issued that alcohol prevalence and drug use prevalence were roughly equal. The 10 accidents involving drug positives accounted for 18 fatalities, 220 injuries, and $18,725,628 in property damage.

53 Fed. Reg. 16640, 16641 (1988). See also J.A. 187-88, 193-203.

It is impossible, given the documented risk, to understand how any asserted privacy interest that the railroad unions claim in the contents of samples of their members' urine or breath—or even medical samples of their blood—could begin to compare with the obvious and overriding interest of the traveling public in having some assurance that common carrier vehicles are not being operated by unspeakably irresponsible persons who find it "enjoyable" while on duty to light up marijuana while "glanc[ing] at the speed indicator [and] . . . the scenery" and "pull[ing] out the throttle." Pp. 26a-27a, *infra*.[16]

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[15] Feron, *supra* n.13 (emphasis supplied).

[16] Even the Air Line Pilots Association, although opposing drug testing of pilots generally, at least supports post-accident testing,

The Court of Appeals majority, unimpressed by such dangers, said it gave great weight to train operators' "legitimate expectations of privacy in the integrity of their bodies." Pet. Cert. 21a. But that is a conclusion, not a rationale. "An expectation of privacy does not give rise to Fourth Amendment protection, however, unless society is prepared to accept that expectation as objectively reasonable." *California* v. *Greenwood*, 108 S. Ct. 1625, 1628 (1988). "The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities." *United States* v. *Jacobsen*, 466 U.S. 109, 122 (1984) (footnote omitted). In the context of hazards of this magnitude, and in the employment setting, there was no legitimate expectation of privacy here sufficient to overcome such a limited and necessary testing.[17] The dissent below pointed

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pre-employment testing, and testing to monitor rehabilitation. See Zorzi, *Transportation Secretary Urges Airline Drug Testing*, Baltimore Sun, June 3, 1988, p. 10A, col. 1. The railroad unions' adamant claims of a constitutional privilege on behalf of their members is all the more shocking in light of the significant number of drug-caused fatalities to railroad workers themselves. One of the present *amici* is the widow of the engineer of the Amtrak train into whose path the Conrail train was driven. See p. 1a, *infra*.

Moreover, the unions' position is far from consistent. On February 25, 1988, counsel of record for respondents testified on their behalf before the Committee on Commerce, Science and Transportation of the United States Senate. He stated in that testimony:

> SENATOR DANFORTH: Mr. Mann, you do not object to drug testing except random testing, is that right?
>
> MR. MANN: That is correct.

P. 35a, *infra*.

[17] *Cf. United States* v. *Villamonte-Marquez*, 462 U.S. 579 (1983) (governmental interest in assuring compliance with documentation requirements permits limited intrusion of boarding vessels); *Committee for GI Rights* v. *Callaway*, 518 F.2d 466, 476 (D.C. Cir. 1975) (holding Fourth Amendment does not bar urinalysis testing for drugs of members of the armed forces, noting that "[w]idespread use of marijuana, hashish and other drugs can have a serious

out the obvious: "the incalculable risk to public safety posed by alcohol or drug impaired train crews." Pet. Cert. at 37a. The suffering of *amici* is unfortunately only one of the recent fatal instances, demonstrating that without effective control of railroad employees' drug use, the risk becomes for some number of passengers and fellow workers a statistical certainty.

The majority in the Court of Appeals, unfortunately, ignored the heart of the Fourth Amendment—that it is a rule of reason—and engaged in an abstract and otherworldly analysis reminiscent of the most refined medieval doctrinal disputes, as if all that were at stake here were the admission of some disputed evidence at a criminal trial. The practical leaders of the Eighteenth Century who wrote and adopted the Fourth Amendment simply could not have intended to erect such a constitutional barrier to such a minimal administrative step to help ensure the public safety. In this context as in others, "while the Constitution protects against invasions of individual rights, it is not a suicide pact." *Haig* v. *Agee*, 453 U.S. 280, 309-10 (1981), *quoting Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 160 (1963). To disallow on constitutional grounds the testing for drug use of operators of hazardous equipment, "we would have to be that 'blind' Court, against which Mr. Chief Justice Taft admonished in a famous passage, *Child Labor Tax Case*, 259 U.S. 20, 37 [1922], that does not see what '[a]ll others can see and understand'. . . ." *United States* v. *Rumely*, 345 U.S. 41, 44 (1953).

B. The Circumstances of a Railroad Accident Make a Warrant Unnecessary and Impracticable.

Subpart C of the regulation, 49 C.F.R. § 219.201 *et seq.*—the portion which is mandatory and imposed by governmental action—requires prompt urine and blood testing of railroad employees who are involved in serious

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debilitating effect on the ability of the Armed Services to perform their mission").

accidents. Surely the existence of such an event—like the collision in which *amici*'s children or other relatives were killed—would be obviously sufficient in itself to supply "probable cause" for the issuance of a warrant to make a reasonable search. *Cf., e.g., Schmerber* v. *California*, 384 U.S. 757 (1966) (automobile accident provided probable cause for blood test). Issuing a warrant in such circumstances, if there were time to get one and serve it, would be virtually a ministerial act. But there is likely to be no time in the confusion after an accident promptly to obtain a warrant.

Drug metabolites or alcohol in blood, breath or urine diminish rapidly in quality as time passes, and the ability to tie them directly to impairment recedes. A triggering event thus may supply the exigent basis for a warrantless search. *Schmerber* v. *California*, *supra*, 384 U.S. at 769-70 (imminent destruction of evidence); *Warden* v. *Hayden*, 387 U.S. 294, 298-300 (1967) (pursuit of fleeing suspect). The Court of Appeals itself appeared to recognize this. Pet. Cert. 16a. See also J.A. 190-91.

Nor can it be expected that railroad employees who in fact have used such substances will cooperate and make themselves available over an extended period of time. They have every incentive to cover up their wrongdoing. As one court of appeals recently commented, "[t]here was expert testimony at trial that a drug abuser would do just about anything to avoid detection." *Rushton* v. *Nebraska Public Power Dist.*, 844 F.2d 562, 566 (8th Cir. 1988). After the collision in which *amici*'s relatives were killed, the engineer testified that "I have never known anyone to turn themselves in." P. 35a, *infra*. The dispatcher in one crash fled and hid for three days to avoid drug testing. It was later also admitted that the brakeman in the Chase, Maryland crash, even though encumbered by a broken leg, managed to flee the scene of the accident and hide the pipe in which he had been smoking marijuana in some brush along the track; it was never found. The engineer delayed testing by refusing an offer of a ride to the hospital. Neither he nor the brakeman

revealed their drug use to authorities in the hours after the accident. In fact, they met and agreed to lie and deny that they had used drugs.[18] Without post-accident tests, their use never would have been detected. It was only after testing their blood and urine that the drug use in the case began to come out. See also J.A. 188-89.

Given the time constraints and the ephemeral nature of the essential evidence required, there simply are no adequate less intrusive alternatives to these testing measures. Some alternatives—such as following employees around and spying on them—would be less workable and far more intrusive. The reasonbleness of testing after a major accident is obvious. And even if there were practical alternatives, that would not in itself render the decision by the FRA or the railroads to choose the policy they did "unreasonable" under the Fourth Amendment. "The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." *Colorado* v. *Bertine*, 107 S.Ct. 738, 742 (1987), *quoting Illinois v. Lafayette*, 462 U.S. 640, 647 (1983). "The fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render the search unreasonable." *Cady* v. *Dombrowski*, 413 U.S. 433, 447 (1973).

The ruling of the Court of Appeals majority here conflicts with the decisions of many other courts that have upheld drug testing of workers in jobs affecting the public safety, against Fourth Amendment challenges. See *Policeman's Benevolent Ass'n* v. *Township of Washington*, —— F.2d —— (3d Cir. No. 87-5793, 1988) (police officers); *Rushton* v. *Nebraska Public Power Dist.*, 844 F.2d 562 (8th Cir. 1988) (employees in state nuclear power plant); *McDonell* v. *Hunter*, 809 F.2d 1302 (8th Cir. 1987) (prison guards); *Committee for GI Rights* v. *Callaway*, 518 F.2d 466 (D.C. Cir. 1975) (members of the armed forces). It has been held that there is no constitutional bar to testing operators of buses that run within a metropolitan area, *Division 241* v. *Suscy*, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976); the need to test operators of interurban trains is surely no less. The D.C. Circuit has acknowledged that because of "*serious* safety concerns" appropriate routine drug tests may be required not just of drivers, but of school bus attendants as well. *Jones* v. *McKenzie*, 833 F.2d 335, 340 (D.C. Cir. 1987) (empnasis in original), *pet'n for cert. pending*, No. 87-1706. And if there is no constitutional prohibition to testing of racetrack jockeys—where the interest asserted to justify the tests is merely that of horse race bettors and spectators in "preserving both the fact and the appearance of integrity of the racing performances"—then surely the interest of the public in transportation safety is sufficient to prevail here. See *Shoemaker* v. *Handel*, 795 F.2d 1136, 1138 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986).[19]

The Ninth Circuit, acknowledging that "our decision may be seen as conflicting with decisions of other circuits," Pet. Cert. 30a, nevertheless announced a different constitutional conclusion of its own. It decided that

> *We think* when testing is undertaken to detect drug or alcohol abuse as a means of improving the safe operation of a railroad, it poses no insuperable burden on the government to require individualized suspicion. . . . [*W*]*e believe* it [a requirement of individual suspicion] *should be* incorporated into

[18] The engineer later lied about it to investigators of the National Transportation Safety Board, for which he subsequently was indicted and pleaded guilty to obstruction of a federal investigation. *United States* v. *Gates*, No. R-88-116 (D. Md. 1988).

[19] *Cf. Policeman's Benevolent Ass'n* v. *Township of Washington*, —— F.2d —— (3d Cir. No. 87-5793, 1988) (upholding drug testing of police officers): "The need in a democratic society for public confidence, respect and approbation of the public officials on whom the state confers that awesome [law enforcement] power is significantly greater than the state's need to instill confidence in the integrity of the horse racing industry." Slip op. at 20.

> the mandatory testing provisions set out in 49 C.F.R. § 219.201 . . . .

Pet. Cert. 26a-27a (emphasis added).

The constitutional, not to mention the factual, authority for the "We think," the "we believe," and the "should be" in the court's edict is impossible to discern. For a court thus to reweigh the policy pros and cons, and thereby reach such a policy conclusion that rejects the determination of both the expert federal agencies set up by Congress, and the private enterprises that operate the railroads, is really an unauthorized kind of judicial review of agency weighing of competing interests. It stands in sharp contrast with, for example, this Court's holding in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), that "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones. . . ." 467 U.S. at 866. The courts of course are the ultimate arbiters of the meaning of the Constitution; but the Fourth Amendment clearly recognizes the need for intrusions on privacy in circumstances too variable to try to list, and contemplates that, here particularly, governmental decisions are to be given reasonable leeway. The Fourth Amendment was not a charter to the Ninth Circuit to second-guess how the railroads should be run. On this record the Ninth Circuit's decision to reject the regulation was not only amazingly unwise policy; it was wholly beyond the court's proper function.

Of three circuits ruling on drug testing subsequent to the decision under review here, two explicitly disagreed with it. *Policeman's Benevolent Ass'n* v. *Township of Washington*, —— F.2d —— (3d Cir. No. 87-5793, 1988); *Rushton* v. *Nebraska Public Power Dist.*, 844 F.2d 562, 567 (8th Cir. 1988). In the other, a 2-1 decision of the Sixth Circuit involving firefighters, one of the two judges of the majority announced that

> I do not consider the "potential," "significant," or "irretrievable harm" that might be visited upon society by drug-using public employees to be proper justification for a search.

Lovvorn v. *City of Chattanooga*, 846 F.2d 1539, 1551 (6th Cir. 1988) (Johnstone, J., concurring).[20] That statement makes explicit what is perhaps implicit in the decision of the Ninth Circuit under review here. *Amici* respectfully submit that, particularly in the context of reasonableness established as the test by the Fourth Amendment, that statement is shocking and wrong.

C. When Employment Entails the Operation of Dangerous Vehicles That Put the Public Safety at Risk, No Particularized Suspicion Need Be Shown.

Although "some quantum of individualized suspicion is usually a prerequisite . . . . the Fourth Amendment imposes no irreducible requirement of such suspicion." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976). *New York* v. *Burger*, 107 S. Ct. 2636 (1987), upholding warrantless searches of automobile junkyards, is simply the latest in a long series of decisions in which this Court has recognized the validity under the Fourth Amendment of searches that are obviously related to the regulation or operation of an ongoing enterprise. See also, *e.g.*, *United States* v. *Biswell*, 406 U.S. 311 (1972) (pawn shop); *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970) (caterer).

Moreover, this case does not involve intrusions on individuals' homes; it has to do with their job performance. The Fourth Amendment's limitations are always less stringent in the business and commercial context. See,

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[20] Even the Sixth Circuit recognized in a companion case that "attention must be focused on the nature of the work force," and "[t]he higher the costs and more irretrievable the losses, the stronger the argument for finding reasonable the initiation of a drug testing program," particularly in "employment sectors where employees literally hold thousands of lives in their hands everyday." *Penny* v. *Kennedy*, 846 F.2d 1563, 1566 (6th Cir. 1988).

e.g., *Donovan* v. *Dewey*, 452 U.S. 594, 598-600 (1981); *Davis* v. *United States*, 328 U.S. 582, 593 (1946). Activities in commerce are at issue here. The present litigation is brought by labor unions. It asserts a constitutional challenge to the nature of one aspect of working conditions, even though elsewhere, in other litigation, unions are challenging the railroad drug testing program simply as a violation of labor laws and collective bargaining agreements.[21]

II. DRUG TESTING BY RAILROADS OF THEIR OPERATING EMPLOYEES DOES NOT EVEN IMPLICATE THE FOURTH AMENDMENT.

The Fourth Amendment does not apply to the tests challenged here at all.

A. The Fourth Amendment Has No Application to Drug Tests Consented to as a Condition of Employment.

Consent to a search of course waives any Fourth Amendment objection. "[A] search authorized by consent is wholly valid." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222 (1973); see also *United States* v. *Mendenhall*, 446 U.S. 544 (1980); *Davis* v. *United States*, 328 U.S. 582 (1946); *Zap* v. *United States*, 328 U.S. 624 (1946), *vacated on other grounds*, 330 U.S. 800 (1947). In many contexts it has long been established that the conferral of benefits, such as responsible employment, may be reasonably conditioned upon the recipient's limiting some rights that a member of the general public would enjoy undiminished.[22] Such conditioning has been

[21] See *Railway Labor Executives' Ass'n* v. *Consolidated Rail Corp.*, 845 F.2d 1187 (3d Cir. 1988); *Brotherhood of Locomotive Engineers* v. *Burlington Northern R.R.*, 838 F.2d 1102 (9th Cir. 1988); *Brotherhood of Locomotive Engineers* v. *Burlington Northern R.R.*, 838 F.2d 1087 (9th Cir. 1988), *pet'n for cert. pending*, No. 87-1631.

[22] *Cf. Schlagenhauf* v. *Holder*, 379 U.S. 104, 113 (1964); *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941) (party in civil action may be required to undergo physical or mental examination as a condition of suing).

upheld even when the general rights modified involved core First Amendment values of political expression. See, *e.g.*, *Connick* v. *Myers*, 461 U.S. 138 (1983); *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947). Background investigations, for example, are far more intrusive, but because the country's safety is at stake are routinely required of both government and private employees as a condition of access to military secrets. See *Department of the Navy* v. *Egan*, 108 S.Ct. 818, 824 (1988).

Where the purpose of a search is directly and inextricably bound up with the ability to perform the duties undertaken, then consent can be recognized. Even in the context of First Amendment expression, where the constitutional test is far stricter, *cf. United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938), "[t]he problem in any case is to arrive at a balance . . . ." *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968); *cf. Department of the Navy* v. *Egan*, *supra*.

Even more readily than in the First Amendment context, this Court has recognized the applicability of this common-sense rule to the more flexible provisions of the Fourth Amendment. In *Wyman* v. *James*, 400 U.S. 309 (1971), it held that the Fourth Amendment did not apply to home visits by welfare officials where refusal to consent would lead to denial of benefits; and in *Zap* v. *United States*, 328 U.S. 624 (1946), *vacated on other grounds*, 330 U.S. 800 (1947), a defense contractor was held barred to raise the Fourth Amendment when it had opened its books and records as a condition to obtaining government contracts.

Even if one assumed that the constitutional restraints applicable to terms of government employment could be translated to the situation of privately employed railroad operators, it certainly is not an unreasonable condition for employment—as an operator of lethal devices—to require submission to tests to detect use of substances that impair the very same physical and mental qualities necessary to operate such equipment with safety. It is

no more objectionable or unreasonable than to condition the grant of licenses to airplane pilots on periodic tests to ensure that they are not losing their vision. See 14 C.F.R. §§ 61.23, 67.13-19.

B. Tests of Breath or Urine Do Not Fall Within the Scope of the Fourth Amendment.

This Court has never ruled that an examination of exhaled breath or excreted urine, waste products of the respiratory and metabolic processes, falls within the Fourth Amendment. The general rule is that searches of abandoned waste material do not. *California* v. *Greenwood*, 108 S. Ct. 1625 (1988). Breath and urine tests, unlike blood tests, do not involve "intrusions into the human body." See *Schmerber* v. *California*, 384 U.S. 757, 767 (1966). Nor does either require the subject to expose private parts in public. The assertion by the Court of Appeals here, citing district court cases, that "urinalyses and body cavity searches [are] equally degrading," Pet. Cert. 23a, is simply absurd, reflecting, no doubt, little experience with either. And surely no one can seriously suggest that a warrant and probable cause are required to smell someone's breath.

That breath analysis and, by extension, urinalysis are not searches within the Fourth Amendment is clear from this Court's reasoning in *United States* v. *Place*, 462 U.S. 696 (1983), which so held with respect to "sniff tests" of luggage by dogs. Citing and quoting *Place* with approval, this Court in *United States* v. *Jacobsen*, 466 U.S. 109, 123 (1984), added that chemical tests to determine whether a substance contains drugs do "not compromise any legitimate interest in privacy."

The Court of Appeals in order to justify reference to the Fourth Amendment simply cited a series of lower court opinions—for the most part dicta—that ignored *United States* v. *Place* and extrapolated from this Court's decision in *Schmerber*, *supra*, which held that inserting a needle into the body and drawing blood was—obviously—a kind of search. All those cases pretended that this

Court in *Schmerber* had already decided the question. The Eleventh Circuit, for example, assumed a urinalysis to be a search because "[t]his is consistent with rulings like that of the Supreme Court [in *Schmerber*] that the taking of a blood sample is a search." *Everett* v. *Napper*, 833 F.2d 1507, 1511 (11th Cir. 1987). Forgetting the far different physical nature of the process by which a blood sample is obtained, and the differences between blood and waste products, the dicta on which the court below relied really seem to say that urine samples like blood samples are both analyzed in laboratories, and so therefore the Fourth Amendment must apply to each. *Cf., e.g., Jones* v. *McKenzie*, 833 F.2d 335 (D.C. Cir. 1987), *pet'n for cert. pending*, No. 87-1706; *McDonell* v. *Hunter*, 809 F.2d 1302, 1307 (8th Cir. 1987).[23] Although the court below similarly asserted that *Schmerber* somehow settled the matter, this Court, of course, has never held any such thing.

Likewise, some lower courts that have taken the further leap of assuming breath tests to be "searches" implicating the Fourth Amendment have done so almost exclusively by again making inappropriate analogy to *Schmerber* v. *California*, *supra*. Yet breath is not something wholly internal to the body. It is something expelled and made public nearly twenty times every minute. Using such loose reasoning, the Ninth Circuit's own previous decision, relied on below, in *Burnett* v. *Municipality of Anchorage*, 806 F.2d 1447 (9th Cir. 1986), cited *only* to *Schmerber* in finding that a breath test constitutes a search, *id.* at 1449, even though acknowledging that "the breath test . . . is clearly a less objectionable intrusion

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[23] *Jones* v. *McKenzie* indeed recognized that "urine, unlike blood, is routinely discharged from the body so that no actual (physical) intrusion is required for its collection . . ." and "[u]rinalysis properly administered is not as intrusive as a strip search or a blood test." 809 F.2d at 1307-08 (quoting *Capua* v. *City of Plainfield*, 643 F. Supp. 1507, 1513 (D.N.J. 1986)).

than the compulsory blood samples allowed under *Schmerber*." *Id.* at 1450.[24]

The point has been made exceedingly well by the dissenting judge in the *Lovvorn* case, previously cited:

> Although the majority of drug testing cases have stated or assumed that a search is involved, I suggest that that is not *necessarily* the case. If an employer without consent were to remove urine with a catheter from the bodies of employees, just as the blood sample was removed by a needle in *Schmerber*, I would agree that this is a search. However, if the employee is asked to donate a urine sample and surrender it to the employer for analysis, is that a search? I would conclude it is not for the simplest of reasons. It does not comport with any commonly accepted definition of the word "search." 846 F.2d at 1552 (Guy, J., dissenting) (emphasis in original; footnote omitted).[25]

What the existing accumulation of lower-court urinalysis and breathanalysis cases really represents is not a body of careful judicial logic, but rather an accretion of loose and careless analogies, all claiming to be based on each other and on this Court's having settled a matter that it never has decided at all. Such fragile but prolific pronouncements if not corrected could seem to point toward conceivable future holdings that almost any externally observed physical information about a person—a voiceprint, a fingerprint, a piece of hair, perhaps even a photograph or videotape[26]—might be a search subject to full Fourth Amendment prerequisites.

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[24] The district court in *Anable* v. *Ford*, 653 F. Supp. 22 (W.D. Ark. 1985), for another example, conceded that it was "unaware of any 'breathalyzer' cases on point" but nevertheless ruled that breath analyses were "searches" comparable to searches of "body cavities, bloodstreams or subcutaneous tissues . . . ." *Id.* at 35.

[25] "[M]any of these decisions . . . merely parrot the conclusion that drug testing constitutes a search within the meaning of the fourth amendment." *Id.* at 1562 (dissenting opinion).

[26] *But cf. Cupp* v. *Murphy*, 412 U.S. 291, 296 (1973), permitting police without warrant "to preserve the highly evanescent evidence they found under his fingernails."

C. The Fourth Amendment Does Not Apply to Drug Tests Required by Privately Owned Railroad Companies Without Governmental Compulsion.

Subpart D of the regulations, 49 C.F.R. §§ 219.301-309, merely authorizes breath or urine tests in specified circumstances. It does not require them. Whether they are required depends on the decision of the railroad company. In fact, the very same panel of the Ninth Circuit in a case decided the day after the one under review here, challenging railroad drug testing under a collective bargaining agreement, acknowledged:

> BN [the Burlington Northern Railroad Company] is not a government agency and, therefore, is not subject to the restrictions of the fourth amendment.

Brotherhood of Locomotive Engineers v. *Burlington Northern R.R.*, 838 F.2d 1087, 1092 (9th Cir. 1988), *pet'n for cert. pending*, No. 87-1631.

The Court of Appeals also recognized that the Fourth Amendment does not limit any actions except those that can legitimately be attributed to the federal government. See, *e.g.*, *United States* v. *Jacobsen*, 466 U.S. 109 (1984). To surmount that hurdle, the Court of Appeals relied simply on a dictum in one of its own decisions from 1973,[27] and on references to statutes that authorize the Secretary of Transportation and the Federal Railroad Administrator to require, *e.g.*, accident reports and safety testing of railroad equipment. Pet. Cert. 10a-13a. Finally, it concluded that the railroads' requiring drug testing under Subpart D should be treated as if the federal government had required it, because

> The general concern with drug and alcohol abuse and the national goal of eradicating that abuse is a matter of common knowledge.

Id. at 13a. Public concern, the Court of Appeals thus concluded, equates to governmental action. Under the Court of Appeals' loose and impatient reasoning, apparently a policy adopted by a private company that is con-

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[27] *United States* v. *Davis*, 482 F.2d 893 (9th Cir. 1973) (upholding airport searches of airline passengers).

sistent with a laudable and important objective that receives national attention, thereby becomes subject to the strictures of the Constitution as if the federal government itself had done it.[28]

This Court has always rejected such an open-ended and unprincipled extension of "state action" concepts, and should do so again now. In fact, in recent decisions this Court has repeatedly rejected such notions and reiterated that even extensive government regulation, Congressional delineation of duties, even government-conferred monopoly status, do not turn an enterprise into the state for purposes of the Constitution. See, *e.g.*, *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, 107 S. Ct. 2971 (1987); *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974). Nor do regulations that encourage private adoption of particular policies. *Blum* v. *Yaretsky*, 457 U.S. 991 (1982). Railroads are regulated, but so are other transportation companies, from airlines to buses and barges, and not excluding automobile manufacturers. That regulation does not turn their policies to assure worker competency and alertness into government action, even when the government authorizes (without requiring) such policies or encourages their adoption. "Even extensive regulation by the government does not transform the actions of the regulated entity into those of the government." *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, *supra*, 107 S. Ct. at 2985. And the fact that "the activities performed by" a private entity "serve a national interest . . . 'does not make its acts [governmental] action.'" *Ibid.*, *quoting in part Rendell-Baker* v. *Kohn*, 457 U.S. 830, 742 (1982).

It is important to recognize that in this aspect of the case, the Ninth Circuit rendered a decision of enormous implications and utterly inconsistent with this Court's decisions on the constitutional meaning of "state action." The

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[28] Other courts, not surprisingly, in the drug-testing context have held the contrary. *Greco* v. *Halliburton Co.*, 674 F. Supp. 1447, 1451 (D. Wyo. 1987).

railroad drug tests referred to in Subpart D are a matter of private decision as to what a railroad expects of its employees.[29] Those employees, without resigning, are able to challenge such requirements through their unions, under the terms of collective bargaining agreements, and in fact have had some success in doing so. See *Railway Labor Executives' Ass'n* v. *Consolidated Rail Corp.*, 845 F.2d 1187 (3d Cir. 1988); *International Brotherhood of Teamsters* v. *Southwest Airlines Co.*, 842 F.2d 794 (5th Cir. 1988); *Brotherhood of Locomotive Engineers* v. *Burlington Northern R.R.*, 838 F.2d 1102 (9th Cir. 1988); *Brotherhood of Locomotive Engineers* v. *Burlington Northern R.R.*, 838 F.2d 1087 (9th Cir. 1988), *pet'n for cert. pending*, No. 87-1631; *Railway Labor Executives Ass'n* v. *Norfolk & Western Ry.*, 833 F.2d 700 (7th Cir. 1987); *Brotherhood of Maintenance of Way Employees* v. *Burlington Northern R.R.*, 802 F.2d 1016 (8th Cir. 1986). The railroads are no different from other corporations in requiring such tests.[30] If the railroad unions are determined to pursue their unseemly effort to avoid drug testing of the operators of lethal locomotives, they at least should be relegated to the arena set up by Congress for resolution of collective bargaining disputes, and not try to elevate such disagreements to constitutional doctrine.[31]

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[29] Respondents acknowledge that "[p]erhaps the most important factor that sets this case apart from all other cases is that the testing is *not* being performed by a public employer on public employees." Br. Opp. at 3 (emphasis in original). Their argument that compulsion exists applies of course to Subpart C, but not to Subpart D of the regulations.

[30] "Over 25% of the Fortune 500 companies now require drug tests of all successful job applicants." *International Brotherhood of Teamsters* v. *Southwest Airlines Co.*, 842 F.2d 794, 799 (5th Cir. 1988) (footnote omitted).

[31] This suit was brought by the unions against only the Secretary of Transportation and the Federal Railroad Administrator. No railroads were defendants. Yet, as previously noted, Subpart D of the regulations does not require drug testing, but simply authorizes railroads to conduct such programs if they choose. In other complaints respondents appear to have recognized this by suing the

CONCLUSION

For the reasons stated, the judgment should be reversed.

Respectfully submitted,

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railroads themselves. See *Railway Labor Executives' Ass'n* v. *Consolidated Rail Corp.*, 845 F.2d 1187 (3d Cir. 1988); *Brotherhood of Locomotive Engineers* v. *Burlington Northern R.R.*, 838 F.2d 1102 (9th Cir. 1988); *Brotherhood of Locomotive Engineers* v. *Burlington Northern R.R.*, 838 F.2d 1087 (9th Cir. 1988), *pet'n for cert. pending*, No. 87-1631. It has been the decision of some (not all) railroads—not an order of the federal government—that instituted those programs. Whatever the decision in this litigation as to the validity of Subpart D, those programs could continue. The railroads, necessary parties, are absent from the case.

APPENDICES

APPENDIX A

Excerpt from transcript, *State* v. *Gates*, *No.* 87-CR-2420, Circuit Court, Baltimore County, Maryland, February 16, 1988.

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[45] On moving out onto Track 1 out of the yard, Cromwell sat in the firemen's seat while the Defendant sat at the controls. Both faced forward. The Defendant called out the first two to three signals within one and a half miles of the yard as Clear, which would be displayed as these signals on this chart. And, at that time, Cromwell acknowledged the Defendant calling out nine signals. Although Amtrak operating rules require that the engineer call each wayside signal and that the brakeman acknowledge, no more signals further down the track were called in the remaining nine miles. After the third signal, Cromwell pulled out a pin joint, which is a very thin, hand-rolled cigarette, containing marijuana that he had brought in his grip. Although he had originally intended to use it on the ride home, Cromwell decided to smoke it then with the Defendant because the two smoked while working on one previous occasion. Each man had about three hits of the joint. Then Cromwell smoked the remainder in a pipe. Although both the Defendant and Cromwell were faced forward and could clearly see the wayside signals, neither called them while smoking the joint.

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[56] The Victims Of The Collison. In addition to the death of the Amtrak Engineer, Jerome Evans, 15 passengers were killed as a direct result of the collison. Caroline and Uriel Bauer, ages 26 and 27, respectively, a recently married couple who resided in Manhattan, New York, both occupied the second [57] coach car, which is the second pasesnger car in the consist. Caroline was pronounced dead at 7:12 p.m. on January 4th, 1987 as a result of cranial injuries and smoke inhalation. Her

husband, Uriel, was pronounced dead at 3:57 a.m. on January 5th, 1987 as a result of compression asphyxiation.

Esther Burkhart, age 71, who lived in Philadelphia, Pennsylvania, also occupied the second car. Mrs. Burkhart died as a result of multiple traumatic injuries primarily to her head and chest.

James Clay, age 33, from Vernon, Connecticut, sat in the second car. Mr. Clay was pronounced dead at 4:38 a.m. on January 5, 1987 as a result of compression asphyxia.

Thomas C. Colley, age 18, a freshman at the Rhode Island School of Design, sat in the second car on his return to school in Providence. Thomas was pronounced dead at 7:45 p.m. as a result of multiple blunt injuries, burns and smoke inhalation.

Laura Corti, age 22, occupied the second car on her return home to New York City. She was pronounced dead at the scene at 4:05 a.m. on January 5, 1987 from compression asphyxia.

Louise Edler, age 70, a resident of Wayne, Pennsylvania, occupied the third car in the consist. Mrs. Edler died of multiple injuries.

Ceres M. Horn, age 16, a resident of Baltimore County, Maryland was returning to school at Princeton [58] University, where she was a freshman honor student. Ceres, who sat in the second car, died as a result of compression asphyxia.

Christiane Johnson, age 20, a senior at Stanford University, rode in the second car traveling from her parents' home in Potomac, Maryland to New York to visit her sister. Christiane was pronounced dead at 4:48 a.m. on January 5, 1987 as a result of compression asphyxia.

Corrine and Kirsten Luce, sisters, age 13 and 16 respectively, occupied the second coach car on their return home to Westerly, Rhode Island. Kirsten was pronounced

dead at 5:25 a.m. on January 5, 1987 from craniocerebral trauma. Corrine was pronounced dead at 1 o'clock p.m. on January 5, 1987 due to multiple trauma to the cranio-cervical and thoracic region.

Adam Moore, age 7, and his grandmother, Pegg. Moore, age 52, were seated in the second car on their trip home to Neptune, New Jersey. Adam was pronounced dead at 11:24 p.m. on January 4, 1987 as a result of compression asphyxia. Mrs. Moore was pronounced dead on January 5, 1987 at 1:14 a.m. due to multiple injuries.

Christina Piasecka, age 41, from Warsaw, Poland, occupied the third car. Ms. Pisasecka died of multiple injuries.

Connie Barry, age 31, occupied the second car on her return home to Ridgefield, Connecticut after visiting family in the Washington area. Mrs. Barry was trapped in the wreckage for 10 hours while rescue workers attempted to free her. She [59] was flown by helicopter to Shock Trauma, where she subsequently died at 6:20 a.m. on January 13, 1987 as a result of multiple injuries and hypothermia.

Approximately 174 passengers and crew of the Colonial sustained serious injuries and required treatment at local hospitals. Numerous fire fighters, police, paramedics, and National Guard responded to the wreck site to render emergency assistance.

* * * *

APPENDIX B

EXCERPT FROM PB88-916301

[SEAL]

NATIONAL TRANSPORTATION SAFETY BOARD

RAILROAD ACCIDENT REPORT

REAR-END COLLISION OF AMTRAK PASSENGER TRAIN 94, THE COLONIAL AND CONSOLIDATED RAIL CORPORATION FREIGHT TRAIN ENS-121, ON THE NORTHEAST CORRIDOR CHASE, MARYLAND JANUARY 4, 1987

NTSB/RAR-88/01

* * * *

[6] *Damage*

The rear Conrail locomotive unit, both Amtrak locomotive units, and the head three passenger cars were destroyed. The middle Conrail locomotive unit was heavily damaged, and the rear nine cars of the passenger train sustained varying degrees of damage.

The rear Conrail unit was virtually disintegrated with parts scattered across the tracks and property east of the tracks. The largest piece of wreckage came to rest about 150 feet northeast of the collision point. The rear of the middle Conrail unit was crushed by the rear unit. Uncoupled from the lead unit, it was propelled forward on track 2 for about 700 feet. Only the rear truck of this unit derailed. The lead Conrail unit sustained relatively superficial damage, although driven forward about 900 feet, it was the only piece of equipment in the two trains that was not derailed.

The forward cab and superstructure of the lead Amtrak locomotive unit was crushed downward and inward to the underframe. Separated from the trucks, the remains of the car body came to rest west of the tracks about 400 feet north of the collision point. The trailing Amtrak unit remained in line with the track, although separated from its trucks, and came to rest leaning about 45° to the right at a point about 450 feet north of the collision point (see figure 3).

The head car of the passenger train, an unoccupied food service car, came to rest behind the trailing Amtrak locomotive. After passing over the food service car, the second car came to rest on its side on top of the rear of the trailing Amtrak locomotive unit. It was more or less perpendicular to the track, badly deformed and bent or crimped downward in the middle at an angle of about 30° (see figure 4). The third car stopped diagonally to the track, leaning to one side, on top of the crushed food service car. One end was crushed between the second

and fourth cars. The fourth car stopped diagonally to the track, upright and with the car body essentially intact. The 5th through 12th cars remained coupled and upright, although the 5th, 7th, 8th, and 9th cars had jackknifed and stopped diagonally to the track. The other derailed cars remained in line with the track (see figure 5).

[12] Derailed locomotive units and cars struck and brought down two steel support poles and the electrical catenary that had been suspended over the four tracks. As a result, the catenary wires over the four tracks were extensively damaged. In addition, the high-tension power transmission lines connecting the NEC substations with the power source were knocked down, which resulted in the immediate loss of propulsion power for all electrically powered trains between Washington, D.C., and a point 22 miles north of Gunpow. The downed wires also ignited diesel fuel from the destroyed Conrail locomotive unit producing dense, black smoke that entered the wrecked passenger cars. Small fires also broke out in residential property and wooded lots adjacent to the accident site.

The derailment destroyed switch 12 and destroyed or damaged about 2,800 linear feet of each of the four tracks at the accident location. About 5,700 linear feet of the tracks had to be replaced along with two steel support poles.

Rescue and wreckage clearing operations prevented the restoration of through-train operations for 2 days resulting in disruption of travel and a substantial loss of revenue to the carriers. In addition, Amtrak incurred substantial expense in moving stranded electrically powered trains and providing alternative transportation to passengers after the accident.

The damage was estimated as follows:

Conrail locomotives	$ 1,325,000
Amtrak locomotives	7,400,000
Amtrak cars	6,423,000
Track	500,000
Overhead catenary system	285,000
Signals and communications	30,000
Cost of clearing wreckage	598,000
Total	$16,561,000

* * * *

[55] Before December 1986, the Conrail engineer had been convicted of 12 traffic offenses, including 9 speeding violations that resulted in two suspensions of his driver's license between 1972 and 1985. Early on the morning of December 5, 1986, after leaving a tavern, the engineer was arrested for driving through a red traffic signal, driving through a stop sign, and driving while intoxicated (DWI) after failing police sobriety tests and submitting to a "breathalizer" examination that revealed a 0.12 percent blood alcohol concentration (BAC).

Following the accident, the engineer voluntarily underwent a supervised chemical-dependency program involving his hospitalization for 7 weeks at a private Baltimore-area treatment facility. He subsequently pleaded guilty to and was convicted of DWI and the other charges; he was fined $1,000 and ordered to undergo counseling.

* * * *

[57] When questioned by Safety Board investigators, the engineer and brakeman of train ENS-121 could not recall any event or occurrence that may have distracted them as they approached Gunpow. However, the engineer did recall that he and the brakeman were conversing at the time. The brakeman said he was standing up and was preparing his lunch. As a result, he said he did not observe any of the wayside signals approaching Gunpow.

He further said that he observed an "approach medium" aspect on the cab signal at the location of signal 816-1. Thereafter, he said, "I didn't observe the cab signal at all. I wasn't even looking at the cab signal."

* * *

[62] *Medical and Pathological Information*

Pathological examinations indicated the 16 fatally injured persons died from the following causes:

6 Compression asphyxia [25]
6 Muitiple trauma
1 Multiple trauma and hypothermia
1 Multiple trauma and smoke inhalation
1 Cranial trauma and smoke inhalation
1 Cranial trauma

[63] Many of the persons aboard train 94 who sustained survivable trauma were injured about the head, face, and mouth as a result of being thrown into seats or against other objects, and/or by being struck by luggage and other articles that fell from the racks above the seats. Of the 24 persons aboard train 94 who had moderate to serious injuries, 11 sustained bone fractures, 8 sustained severe contusions and/or lacerations, 3 sustained concussions, and 2 sustained cervical/spinal trauma.

The Conrail engineer received only minor injuries as a result of the accident. The Conrail brakeman had a fractured leg that he stated he sustained either when he alighted from the locomotive or when he ran from the track after the collision.

Toxicological Testing

At the time of this accident, FRA regulations (49 CFR Part 219, Subpart C) stipulated that all train crewmembers and other railroad employees subject to

[25] Compression asphyxia is asphyxiation (the lack of oxygen), often the result of trauma to the respiratory system.

the Federal Hours of Service Act involved in a major train accident resulting in one or more fatalities were subject to mandatory toxicological testing. Dispatchers and operators directly involved in the accident were expressly covered under this requirement. Blood and urine samples for testing were specifically required from each surviving employee; body fluid and/or tissue samples were required to be taken from fatally injured employees. The regulations further required that the railroad "make every reasonable effort to assure that samples are provided as soon as possible after the accident." The FRA sold kits to the railroads that included vials for holding samples, as well as labels and containers for shipping the samples to the Federal Aviation Administration's Civil Aeromedical Institute (CAMI) Forensic Toxicology Research Laboratory at Oklahoma City, Oklahoma.

Both Conrail and Amtrak had amended their rules to conform with the FRA testing regulation. Amtrak had included its new rule 100G-A1 in NEC timetable No. 4, in effect, at the time of the accident (see appendix D). The new rule stated that employees would be required to provide blood and urine samples after certain accidents and incidents as provided for under the Federal regulations. It also stated that employees refusing to submit to testing would be removed from service and would be subject to dismissal. According to Amtrak, corridor supervisors and managers were given a 2-day training course on the testing requirements and the techniques in taking and shipping samples to CAMI.

The surviving crewmembers of train 94, the Edgewood block station operator, and the E-section dispatcher testified that they understood Amtrak rule 100G-A1 and expected that they would be required to submit to toxicological tests after the accident.

The surviving crewmembers of train 94 were taken to hospitals for treatment of injuries. They were not accompanied by Amtrak supervisors and only one, the

extra assistant [64] conductor, provided a specimen for testing. According to the extra assistant conductor, he gave a urine sample about 6½ hours after the accident. No blood was drawn. The CAMI lab's screening of the urine was negative for alcohol and illicit drugs, but was positive for Acetaminophen (a pain relief medication) and phyenylpropanolamine (an appetite supressant or decongestant). The CAMI report described these as ". . . compounds probably from over-the-counter or prescription medication."

The Edgewood block station operator, accompanied by his supervisor, provided samples of his blood and urine about 4 hours 40 minutes after the accident. CAMI's screening of the samples were negative for alcohol and drugs. No other dispatchers or operators were either asked to submit or submitted samples for testing.

A Baltimore County Fire Department officer testified that he detected a strong odor of alcohol on the breath of the flagman of train 94 when he met him shortly after the accident. He also stated that he noticed nothing unusual about the way the flagman walked or talked at time. The fire department officer was a trained paramedic who had treated numerous accident victims later determined to have been under the influence of alcohol. The officer reported his observation to his superior, the deputy fire chief, the day after the accident. The flagman testified that he had not consumed any alcohol before, during, or after his tour of duty on January 4. Amtrak employees and supervisors who met the flagman after the accident stated that he appeared to be normal and that they did not detect the odor of alcohol.

A tissue sample from the Amtrak engineer was sent to CAMI for testing; the test was negative for alcohol. The toxicological report also stated that the specimen was unsuitable for further analysis.

The Amtrak general superintendent testified that he was aware that the FRA regulations and the Amtrak

rule regarding toxicological testing did not give him discretion in deciding which employees should be tested. The general superintendent also testified that he decided that only the Edgewood operator "might have been contributory" and ought to be tested.

The senior Amtrak officer at the accident site was the assistant vice president-transportation. When he arrived at the site, the flagman and two other assistant conductors had not provided toxicological samples. The assistant vice president also testified that he decided that the performance of the crew of train 94 and the dispatcher had no bearing on the accident. In addition, he said that he thought that he had discretion in the matter, and therefore, he did not require the crewmembers to be tested.

On January 6, 1987, Amtrak's general manager informed the Safety Board that the dispatcher and the surviving crewmembers of train 94 had not been required to submit to testing. Shortly afterward, the Amtrak assistant vice president-transportation [65] advised a member of the Safety Board that he had talked to the FRA associate administrator for safety. The assistant vice president related that he told the associate administrator, "We're running out of time. They're [surviving crewmembers] really not involved. We'd like some relief on that . . . referring to the toxicological tests. We do not want to put these people through more. It would not prove anything."

According to the assistant vice president, the associate administrator replied, "Yes, I understand and I agree." (See appendix J.) During the Safety Board's public hearing, the FRA associate administrator testified that he did not think Amtrak was asking for a waiver of noncompliance after failing to comply with the regulations. On January 7, 1987, following the disclosure that the surviving crewmembers of train 94 had not been tested in accordance with the rules, the FRA Office of Safety cited Amtrak for violations of the testing regulations.

At the Safety Board's insistence, Amtrak asked the dispatcher, conductor, flagman, and regular assistant conductor to provide blood and urine samples for testing on January 8. These samples were sent to the Center for Human Toxicology (CHT) in Utah. According to the reports furnished by the CHT, no drugs were detected in the samples provided by the assistant conductors and the dispatcher. The samples provided by the conductor were found to contain small quantities of a muscle relaxant and its metabolites.

Less than an hour after the accident, Conrail officials at the accident site had put the engineer of train ENS-121 in an ambulance to be taken unescorted to a hospital. About 4 p.m., they learned that he had left the ambulance and was still at the accident site. The Conrail Baltimore terminal superintendent then directed the Bay View trainmaster and a Conrail police captain to take the engineer to a hospital to provide samples for toxicological tests. After locating the engineer, they arrived at Franklin Square Hospital at 4:25 p.m., and the engineer was immediately taken for examination and x rays.

At 4:30 p.m., the hospital drew blood from the engeneer for diagnostic purposes. This blood was screened for drug use; the hospital's records show that the test revealed less than 10 mg/dl blood alcohol and was negative for all other drugs including the cocaine metabolite (benzoylecgonine) and phencyclidene (PCP). At 5:30 p.m., the trainmaster located the doctor who was examining the engineer and requested that more of the engineer's blood be drawn for FRA testing. The blood sample was drawn about 6:00 p.m.; shortly after, the trainmaster witnessed the engineer provide a urine sample.

The trainmaster and an Amtrak official also witnessed the drawing of enough blood to fill two 10-ml "vacuutainer" vials that were in the FRA test kit the trainmaster had brought with him. After sealing the vials,

the trainmaster labeled the seals [66] and had the engineer initial them as prescribed. He then iced and sealed the container and affixed the shipping labels, completing the procedure at about 6:10 p.m.

At 8 p.m., Conrail supervisors learned that the brakeman had been admitted to Johns Hopkins Hospital. The Bay View trainmaster arrived at that hospital about 9 p.m. with an FRA test kit. He was not able to obtain the urine sample until 9:50 p.m. or the blood sample until about 10:15 p.m. Again, he witnessed the taking of the samples; in this instance, enough blood was drawn to fill three 10-ml vials. He repeated the sealing, labeling, and packing procedures he had followed in the case of the engineer.

The specimen containers from the Conrail engineer and brakeman were shipped by air express to CAMI that night. CAMI subsequently reported finding the following marijuana concentrations in the specimens:

	Nanograms per Milliliter		
Individual	delta-9-THC [1]	THC-COOH [2]	Hours after Accident
Engineer-serum	<5	42	5.0
Engineer-urine		67, 72	5.0
Brakeman-serum	<5	13	8.5
Brakeman-urine		87, 144 [3]	8.5

[1] Delta-9-THC (delta-9-tetrahydrocannabinol) is believed to be the primary psychoactive ingredient of the marijuana (cannabis) plant.

[2] THC-COOH (sometimes rendered as 9-carboxy-THC) is a major nonpsychoactive metabolite of marijuana found in blood and urine.

[3] CAMI reported two values on the urine marijuana carboxy (COOH) metabolite concentration using two different quantification techniques. The second values shown for THC-COOH were determined with the addition of a deuterated standard to the urine samples.

Only marijuana was found in the CAMI analysis; tests for the other drugs in the protocol were negative. CAMI reported less than 5 ng/ml of delta-9-THC in the serum of both men. According to the CAMI toxicologist, the level of delta-9-THC below 5 ng/ml was not quantified, although 5 ng/ml was apparently not the minimum level of sensitivity of the test.

After the Safety Board toxicologist reviewed the CAMI toxicology laboratory's analysis of the samples and after discussions among the Safety Board, the FRA, and CAMI, the Safety Board requested that any unused portions of the samples be shipped to the CHT for confirmation analysis. As a result, the serum and blood from the brakeman and urine from the engineer were shipped to the CHT. The CAMI toxicologist reported there [67] was insufficient serum from the engineer for a confirmation analysis. In addition, the Safety Board sent the vacuutainer vial that contained the hospital's diagnostic bleed sample taken from the Conrail engineer to the CHT for testing. CHT reported that the three drops of blood in the vial were insufficient for marijuana analysis.

The CHT reported the following results of its testing of the specimens forwarded by CAMI:

	Nanograms per Milliliter		
Individual	delta-9-THC	THC-COOH	Hours after Accident
Engineer-serium	No sample	—	—
Engineer-urine		182	5.0
Brakeman-serum	Negative *	23	8.5
Brakeman-urine		80	8.5

In addition to cannabinoids, the CHT drug screen protocol included ethanol, opiates, PCP, amphetamines, barbiturates, cocaine, tricyclic antidepressant, antihistamines, carbamates sedative (meprobamate), and synthetic narcotics (meperidine or Demerol). The Conrail engineer's sample was found to be negative for all of these. The Conrail brakeman's urine tested positive for PCP; a gas chromatography/mass spectrometry (GC/MS) verification and quantification showed 45 ng/ml of PCP in his urine.

* The sensitivity limit of serum delta-9-THC by the technique used by CHT is about 0.5 ng/ml.

Inconsistencies in the CAMI test results and documentation prompted an investigation of the CAMI toxicology laboratory a month after the Chase, Maryland, accident. Subsequently, the inspector general of the DOT took over the investigation, the laboratory was closed, the biochemist in charge of the laboratory was relieved of his duties, and the FRA began using the CHT to analyze test samples.

On May 26, 1987, the CAMI biochemist pleaded guilty to Federal felony charges of providing false information to the FRA. According to the FRA, the CAMI laboratory had reportedly falsified blood serum test results in some previous train accident-related cases that occurred after the FRA test regulations were implemented early in 1986. The laboratory lacked the sophisticated GC/MS equipment needed to make the tests until late 1986, and no one in the laboratory had the expertise [68] to use the equipment when the Chase railroad accident tests were performed. The Safety Board further learned that the GC/Ms equipment had not been calibrated for accuracy since December 5, 1986; moreover, it had been improperly calibrated at the time of the testing and had not been recalibrated since. A deuterated internal standard was not used in the serum marijuana analysis, nor were the serum THC data retained after the tests were made.

Following these developments, the CHT staff collected all FRA sample containers at the CAMI laboratory, including the original urine and blood sample containers for the Conrail engineer and brakeman. The engineer's

blood sample container held a small amount of blood that was subsequently diluted, analyzed, and found to contain 52 nanograms per milliliter of the carboxylic acid metabolite (THC-COOH) of marijuana. The diluted blood sample was reported to contain less than the test detection level of psychoactive delta-9-THC. However, due to the very limited sample, the sensitivity to detect THC was reduced. The urine sample of the engineer was found to contain 212 ng/ml of the carboxy metabolite of marijuana (see appendix K).

The specimens obtained for the Conrail brakeman were also reanalyzed. The results reported by CHT were 15 ng/ml of THC-COOH in the blood, 109 ng/ml of THC-COOH in the urine, and 64 ng/ml of PCP in the urine (see appendix K).

* * * *

[75] According to the report of the Baltimore County Fire Department, the county's emergency communications center received two emergency calls reporting a "big explosion on Eastern Avenue" at 1:29:47 p.m. and 1:29:49 p.m. On the basis of these calls, the Chase station units, three additional engine companies, a ladder truck, two heavy rescue trucks, a three-piece hazardous materials unit, a battalion chief, and a parademic field supervisor were dispatched to the scene at 1:31:46 p.m. The Chase units arrived at the scene at 1:37 p.m., but while en route, the medic unit made a "heavy smoke showing" report at 1:36 p.m. and requested that four additional medic units be dispatched. At this time the paramedic field supervisor, while en route ot the accident site, upgraded the request to eight medic units. This initiated the "major medical command mode" portion of the fire department's emergency plan, mobilizing the remaining medic companies in the county. Four additional fire companies, an air unit, and a mobile command post were dispatched at 1:42 to the Harewood Road area on the west side of the tracks. Also at 1:42 a battalion chief arrived and took overall command at the site. At 1:49,

the "major command mode" of the fire department's emergency plan was implemented mobilizing all remaining county volunteer units.

* * * *

[102] Despite these pharmacokinetic limitations, some conclusions can be made regarding the use of marijuana by the two Conrail crewmembers based on studies of the blood and urine concentrations of THC and its metabolites in volunteer subjects.[36]

Almost 9 hours after the accident, the brakeman had a metabolite (THC-COOH) serum concentration of 23 ng/ml, a reported THC of 0, and a urine metabolite concentration of 80 ng/ml. Analysis of the second sample gave a urine concentration of 109 ng/ml. Assuming the brakeman did not use marijuana between the accident and the time of sampling, this information fits the profile of a frequent user. Assuming that the brakeman was a frequent user, then it can be concluded that he used marijuana within 2 days of blood sampling and that use could have occurred within 24 hours of the sampling time or within the 15-hour period before the accident.

The brakeman also had 45 ng/ml of PCP in his urine. In a human volunteer study, PCP was shown to have a half-life of about 17 hours, although in two individuals it was as long as 2 days, and in one subject, it was as short as 7 hours. Since blood concentrations are not available, the Safety Board could not determine when the brakeman ingested PCP or its effect on his performance at the time of the accident. If the marijuana and the PCP had been taken at the same time, the finding of PCP in the urine sample and the half-life of PCP

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[36] Peat, Michael A., McGinnis, K. M., et al, "The Disposition of 9-Tetrahydrocannabinol, 11-Hydroxy-9-Tetrahydrocannabinol, and 11-Nor-9-Carboxylic-9-Tetrahydrocannabinol in Frequent and Infrequent Marijuana Users," submitted to Journal of Clinical Pharmacology and Experimental Therapeutics.

would support an assessment that marijuana was used within 24 hours of the time the samples were provided.

From the engineer's second set of urine and blood specimens, CHT obtained THC-COOH values of 212 ng/ml and 52 ng/ml, respectively. Urine concentrations of THC-COOH vary greatly and are not definitive in establishing the time of use. Comparison of the results of the blood analysis with those reported by Peat [37] suggests marijuana use within 24 hours before the samples were taken if the engineer is characterized as a heavy user. A blood value of 52 ng/ml clearly indicates that the engineer was a frequent user. A frequent user having a carboxy metabolite blood level of 52 ng/ml would be expected to have had a THC concentration in the range of 1.0 to 10 ng/ml. Since values above 3 ng/ml would probably have been detected by the CHT analysis, it is reasonable to assume that THC concentration in the engineer's blood would have been less than 3 ng/ml at the time the specimens were given. The THC concentration at the time of the accident would have been considerably greater.

[103] Mason and McBay have suggested that 5 ng/ml of THC in blood be used as a conservative limit for the presumption of a significant degree of a marijuana-induced effect.[38] According to Peat, data for both light and heavy users indicate blood THC concentrations are less than 5 ng/ml 1 hour after smoking one marijuana cigarette. Behavioral studies suggest, however, that pharmacological effect due to marijuana use persist longer than 1 hour.

A number of studies have determined the effects of marijuana use on a variety of performance tasks including driving an automobile and flying an aircraft simula-

[37] Ibid.

[38] Mason, A. P. and McBay, A. J., "Ethanol, Marijuana, and Other Drug Use in 600 Drivers Killed in Single-Vehicle Crashes in North Carolina, 1976-1981," Journal of Forensic Sciences, 1984.

tor. One of these studies shows that performance decrement occurred up to 7 hours after smoking a marijuana cigarette depending on the performance parameter measured.[39] The THC concentration correlated with the performance decrement. Another study using a flight simulator shoked a decrement for up to 24 hours after use of a marijuana cigarette.[40] A third study looked at the combined effects of marijuana and alcohol and reported that the combined effect was more than the expected additive effects of the individual drugs.[41]

The above studies on marijuana use and performance appear to agree that there is a measurable decrement in performance for a period that is dependent on type and complexity of the performance function that is measured. The concentration profile of the engineer is well within the limits of the above studies since 5 hours after the accident he had a blood acid metabolite value of 52 ng/ml.

The 5-hour delay in obtaining the engineer's blood and urine samples negates the ability of the tests to determine the presence of a BAC level of about 0.06 percent or less at the time of the accident. It is known that the engineer had used alcohol on 2 successive nights before the day of the accident. The fact that he had pleaded guilty to a charge of driving while intoxicated during the early morning hours about 2 weeks before the accident and had voluntarily admitted himself into a hospital-administered chemical dependency program after the accident substantiates his frequent use of alcohol.

[39] Bennett, Gene, Licko, V., and Thompson, Travis, "Behavioral Pharmacokinetics of Marijuana," Psychopharmacology, Vol. 85, 1985.

[40] Yesavage, Jerome A., et al, "Carry-Over Effects of Marijuana Intoxication on Aircraft Pilot Performance: A Preliminary Report," American Journal of Psychiatry, Vol. 142, 1985.

[41] Sutton, Lawrence R., "The Effects of Alcohol, Marijuana and Their Combination on Driving Ability," Journal of Studies on Alcohol, Vol. 44, 1983.

[104] In his study, Sutton had found significant driving impairment when marijuana and alcohol equivalent to a 0.06 percent BAC were used in combination. If the Conrail engineer metabolized ethanol at the average rate of 0.015 percent per hour (conservative for a heavy drinker), then the ethanol in his blood would not have been detectable when he gave a blood sample 5 hours after the accident if he had a BAC of 0.06 percent at the time of the accident.

The literature cited previously supports the finding that the engineer's performance may have been impaired from the use of marijuana. Further, this could have been exacerbated if ethanol had also been present in the engineer's blood or if he had been suffering from alcohol abuse the night before.

The Safey Board believes that there were a significant number of manifestations of less than satisfactory performance by the Conrail crewmembers—the most evident of which was their failure to respond to restrictive signal aspects. The other manifestations of impaired performance include: their failures to resolve the console radio problem and to make the required predeparture brake tests; their failure to properly test the ACS system including the alerter whistle; the engineer's possible mistaking of the deadman cutout for the ACS cutout lock, and the engineer's delayed throttle responses. The Safety Board concludes that, based on this accumulation of manifestations of degraded performance and on the results of the toxicological testing, that the crewmembers of train ENS-121 were impaired at the time of the accident from the effects of marijuana possibly combined with the effects of the use of alcohol the night before the accident.

The Safety Board concludes that the ENS-121 crew's use of marijuana led to their inattention to their primary duties of operating the locomative in a safe manner.

* * * *

[123] *Supervision of Toxicological Testing.*—At the time of this accident, Federal regulations required all train crewmembers, dispatchers, operators, and other employees subject to the Federal Hours of Service Act to submit specimens for toxicological testing "as soon as possible" after a major accident that resulted in fatalities and in which they had direct involvement. The regulations required that the railroads make "every possible effort to assure that samples are provided" for testing. Amtrak and Conrail had included this testing requirement in their operating rules and had instructed supervisors and employees on its provisions and the proper use of the testing equipment. All Amtrak and Conrail crewmembers as well as the dispatcher and block station operators were required to be tested, and they stated that they expected to be tested.

Amtrak's safety supervisor and assistant vice president of transportation arrived at the site 30 minutes and 1 hour 25 minutes after the accident, respectively. Three Amtrak superintendents were there by 3:30 p.m., and the general superintendent arrived an hour later. Conrail's superintendent at Baltimore testified at the public hearing that he was on the scene 50 minutes after the accident. Shortly afterward, he was joined by a trainmaster and a road foreman of engines. Still later, a Conrail police captain and another trainmaster arrived. Thus, within 3 hours of the accident, at least six Amtrak and five Conrail supervisors were on the scene.

Amtrak officials testified at the public hearing that because the accident occurred on Amtrak and all involved were subject to Amtrak rules and supervision, it was Amtrak's responsibility to enforce the testing requirement. From the time the first supervisors arrived at the scene, each crewmember should have been monitored and taken promptly to provide specimens for testing.

Of the seven Amtrak employees who were subject to the testing requirements, only the Edgewood block sta-

tion operator was taken to a hospital by a supervisor for testing. Amtrak officials did not accompany the other employees to hospitals to ensure that specimens were furnished. One Amtrak assistant conductor did have a urine specimen taken that was forwarded to CAMI for testing, although the stipulated procedures were not followed.

Although a fire department official testified that he detected a strong odor of alcohol on the breath of the flagman of train 94 not long after the accident, he observed nothing else about the flagman that might have indicated he was intoxicated. Further, no other crewmembers corroborated the fire department official's testimony and some stated the flagman showed no signs of being under the influence of alcohol. In the event the conductor was incapacitated, the flagman would have been in charge of the crew of train 94. In that position, he would have had the responsibility for the train's passengers. Because of the importance of the position the flagman may have held and because he was a crewmember aboard a train involved in an accident, the Safety Board believes that testing of the flagman was particularly important. Because specimens for testing were not taken until several days after the accident, it is not possible to prove or disprove the testimony of the fire official concerning the flagman's condition.

Similarly, the Safety Board could not establish if the other crewmembers of train 94 and the dispatcher were free of alcohol and drugs because Amtrak's ranking officials at the accident site decided their performance had no bearing on the accident. The Amtrak assistant vice president of transportation circumvented his own company's rule and the Federal regulations when he decided not to have these persons submit to testing.

Following the accident, the Conrail engineer remained at the site and talked with many people including the Conrail terminal superintendent who, about an hour after the accident, ordered the engineer to be put in an ambulance to transport him to a hospital. However, since no supervisor escorted the engineer to the hospital, the engineer was able to leave the ambulance undetected. Valuable time was lost because the Conrail trainmaster at the accident site did not escort the engineer to the hospital for testing.

The Safey Board determined that neither the Conrail terminal superintendent nor the Amtrak assistant vice-president of transportation attempted to learn where the engineer had been taken and to instruct a supervisor to take samples. About 2½ hours after the accident, it was discovered that the engineer was still on the site and the Conrail trainmaster was told to accompany him to a hospital. Another 2 hours passed before a blood specimen was drawn for FRA testing, although the engineer had been at the hospital with the trainmaster for more than 1½ hours.

The brakeman did not provide specimens until 8 hours 45 minutes after the accident. His whereabouts were unknown to Amtrak and Conrail officials for more than 6 hours.

The Safety Board is deeply concerned about the failure of Amtrak and Conrail supervisors to comply with the intent of the FRA regulations for postaccident toxicological testing and about FRA's inability to achieve timely compliance with its regulations by these two railroads in this accident. The Safety Board is pleased that both railroads have now implemented all parts of the FRA's regulations, including reasonable cause testing. However, the Safety Board is not convinced that the compliance deficiencies that occurred in this accident will not reoccur.

* * * *

[144] *Probable Cause*

The National Transportation Safety Board determines that the probable cause of this accident was the failure,

as a result of impairment from marijuana, of the engineer of Conrail train ENS-121 to stop his train in compliance with home signal 1N before it fouled track 2 at Gunpow, and the failure of the Federal Railroad Administration (FRA) and Amtrak to require and Conrail to use automatic safety backup devices on all trains on the Northeast Corridor.

* * * *

RECOMMENDATIONS

Based on its investigation of this accident, the National Transportation Safety Board on January 15, 1987, issued Safety Recommendations R-87-1 through -3 to the National Railroad Passenger Corporation (Amtrak):

* * * *

[146]—to the Consolidated Rail Corporation (Conrail):

* * * *

Improve the methods of identifying employees who abuse alcohol and/or drugs. (Class II, Priority Action) (R-88-13)

—to the Federal Railroad Administration:

Expand and intensify its oversight of Amtrak's operating practices, supervisory efficiency checks, and compliance with Federal safety regulations (including the requirements for postaccident toxicological testing), and periodically provide the Safety Board with its assessment of Amtrak's performance in these areas. (Class II, Priority Action) (R-88-14)

* * * *

APPENDIX C

Excerpt from deposition of Ricky L. Gates, *In re Rail Collision Near Chase, Maryland on January 4, 1987 Litigation*, MDL No. 728, U.S.D.C., D. Md., March 24, 1988.

[74] Q. When you left the Bayview Yard, what did you and Mr. Cromwell do?

A. We started some general conversation, I don't remember specifically what all the conversation was. It generally had to do with he was saying about a trip before then, we were complaining about the condition of the engines and that they should have been prepared for us before we signed up, and as we got north of River Interlocking, I believe, he had pulled out half of a pin joint of marijuana and asked if I wanted to smoke some.

Q. Up to that point had you been calling out [75] the signals?

A. Those two signals I did call.

Q. Which ones were they?

A. North Point and River.

Q. Was Mr. Cromwell also required to call out the signals?

A. Yes.

Q. Did he call out those first two signals?

A. I don't recall him calling them out, no.

Q. Do you recall him calling out any of the signals?

A. No.

Q. Did you call out any signals after River?

A. Not to my knowledge. Well, other than the stop signal, when I saw that.

Q. At the Gunpow Interlocking?

A. Yes.

Q. Okay. What did you do when Mr. Cromwell pulled out the marijuana cigarette at about River?

A. He asked me if I want to smoke it then, and I told him it was his, it was up to him, that I [76] would prefer if we were going to smoke anything, to wait until we got on the Port Road branch.

MR. SARSFIELD: Wait until what? I am sorry.

A. Until the Port Road branch.

Q. What was the reason you wanted to wait for the Port Road branch?

A. The scenery was better, the river on one side, the trees on the other, I felt is was more enjoyable there.

* * * *

[77] A. The next thing I remember, we were still talking. I don't remember the exact nature of the conversation, we were still in the nature of complaining about the engines and him telling me something about the trip before then and his brother or something. And he put what was left of the joint into a pipe and he started lighting it up.

Q. At that point you had had three hits on the joint?

A. I believe so, yes.

Q. And then he put the remains of the joint into a pipe; is that correct?

A. Yes.

Q. What did he do with that?

A. He lit it up. He passed it to me at one point, but it had gone out, and I could—I don't recall whether I either tasted it before I tried to [78] light it, or I just smelled it, but I could smell the remnants of PCP in the pipe. And I handed it back to him and more or less I was agitated about it, and I mentioned it to him, and he told me it was his girlfriend's pipe and she had probably smoked it.

Q. Does PCP have an odor?

A. Yes, like parsley flakes. That was the only experience I had ever had with it years before, and that is what it smelled like, and so that's what I assume it was.

* * * *

[82] A. Next thing I recall is through the conversation, I was running assuming we were going to go out or keep moving at Gunpow Interlocking, and I was trying to

make, save as much time as I could, I pulled the throttle out a little more is the last thing I remember.

* * * *

[88] Q. Now, as you were approaching signal 816, what were you looking at?

A. I don't recall specifically, for the same reasons. I know I was talking to Butch, I glanced at him, because that's at the point where he was cutting off the tops of the water bottles, and I observed part of that. I probably glanced at the [89] speed indicator at some point, the scenery around me and at the signal. I was taking in quite a bit.

* * * *

[104] Q. All right. What happened next?

A. Like I say, the general conversation, looking around at the scenery, then I suppose at approximately five to six pole lengths at the point [105] where I would have started slowing down to 40 before the interlocking I glanced up and I noticed the stop signal in front of me. I yelled to Butch more or less something obscene was the adjective I used that we got a stop signal, put it into emergency with the automatic brake, put the independent brake all the way on, put the throttle completely in the off position, took the reverser and threw it to the south position, pulled the throttle back out, which is called plugging the engines. We started sliding through. I grabbed the portable radio, just before we got under the signal. I started yelling three emergencies and started yelling our location and what was going on, that we were going through the stop signal, and I was more or less giving a play by play, that I wasn't sure we were going to get through the switch or not. Butch at that point was putting on his jacket, and he got off around the front of the engine and went down on the steps and as we slid slowly through the switch, he stepped off on to the ground and stood [106] at the switch as we continued sliding further.

* * * *

[140] Q. What quantities were you normally drinking alcohol?

A. Anywheres from a minimum of a six-pack a day to a case and a half, two cases a day.

Q. A six-pack to a case or two cases a day; is that correct?

A. Sometimes, yes.

Q. And what was your average consumption? Was it closer to the one case?

[141] A. Average consumption was probably close to a case, yes.

MR. SARSFIELD: What was the answer to that? Average consumption was what?

A. Probably close to a case of beer a day.

Q. It was that pretty much every day?

A. Almost every day, yes.

Q. And by a case of beer, of course, we are referring to 24, 12-ounce cans of beer; is that correct?

A. Yes.

Q. For what period of time had you been consuming alcohol at that rate of almost a case a day, or over a case a day?

A. I would say for close to a year at that time.

Q. And during what times of day would you do your drinking?

A. Any time.

Q. What time of day would you start drinking?

A. Any time.

* * * *

[142] Q. How frequently were you using marijuana at this point in time?

A. Maybe once or twice a week.

Q. How much would you use over the week, in terms of a quarter of an ounce?

[143] A. Usually two or three joints at that time. Prior to Christmas, I believe a couple of weeks before Christmastime. I had been on vacation for a week, and I had smoked about a quarter ounce of marijuana while I was on vacation.

Q. For what period of time had you been using marijuana at this rate?

A. Since about the age of 18.

* * * *

BY MR. BUCKLEY:

Q. Would you admit that if you had not had the distractions and had been paying attention, you would have been able to see the home signal in time and to have stopped before going through the switch at Gunpow?

A. Probably would have, yes.

* * * *

[215] A. I was starting to believe that I was psychologically addicted to marijuana, that—because I couldn't make myself quit, unless I replaced it with alcohol. And I was daydreaming quite a bit, when I was off to myself.

Q. Did you ever use hash?

A. Yes.

Q. How frequently did you use hash, hashish?

A. Not very frequently, you know. You use it just the same way as I would marijuana, but it wasn't as available.

Q. Did you use it in 1986?

A. I can't recall specifically; maybe.

Q. Did you ever use marijuana or any other illegal drugs with any of your Conrail co-workers?

A. Yes.

Q. The answer is yes?

A. Yes.

Q. On how many occasions?

A. I don't know.

[216] Q. Did that occur in 1986?

A. Yes.

Q. Was that a fairly frequent occurrence?

MR. SARSFIELD: Objection to leading.

Q. How frequent was the occurrence?

MS. SHEARER: If I might have a moment.

A. Would you repeat the question, please?

Q. How frequently did you use marijuana with your Conrail co-workers in 1986?

A. I can't recall any—I don't know how to answer it as far as frequency goes, but it was a number of times.

Q. More than ten?

A. Probably.

Q. More than 20?

A. Maybe.

* * * *

[222] A. . . . Again, I might add I am subject to blackouts under the influence of drugs and alcohol.

Q. How common is the use of drugs or marijuana by Conrail employees?

MR. SARSFIELD: Objection.

A. I couldn't answer that.

Q. What is the reason you couldn't answer that?

A. Because I am not accountable for everyone else.

Q. Just talking in terms of your knowledge, [223] based on your knowledge, how frequent is the use of marijuana or other illegal drugs by Conrail employees?

MR. SARSFIELD: Objection, please.

A. Again, I can only answer for myself, and whoever was around me, if they did it, and they were around me when I was doing it, then we did it, or if they had it. I was around them, we did it. But I am not sure how to answer as far as frequency goes. Sometimes it was infrequent, sometimes more frequent than others.

Q. So it is something you did have occasion to observe from time to time; is that fair to say?

A. Yes.

Q. Okay. How long have you been subject to blackouts?

A. I am not sure about that either. I hadn't even been aware of it, until I started into recovery, that I was having blackouts.

* * * *

APPENDIX D

Excerpt from testimony of Edward Walter Cromwell before the Grand Jury, in the Circuit Court for Baltimore County, Maryland, *In re Special Investigation*, May 1, 1987.

* * * *

[103] Q: Were you doing anything at that time besides calling the signals?

A: That's when I reached in and got my joint out.

Q: The pin joint?

A: Yes.

Q: At what point? Was it after you called those two signals or before or during?

A: I believe it was right after or maybe even before [104] the North Point signal.

Q: Before the North Point signal?

A: I'm not exactly sure, but it was right outside of the yard.

Q: Outside of the yard?

A: As we were leaving Bay.

Q: As you were leaving Bay while you were on track number one?

A: Right, yes.

Q: And did you light the joint?

A: Yes, I did.

Q: What did you do with it?

A: We smoked it.

Q: When you say we, who do you mean?

A: Rick and I smoked.

Q: And how many hits off of it did you have?

A: I believe three.

Q: And how many did Rick have?

A: Probably about three also.

Q: Now, why did you pull that out? Why did you do that with Gates?

A: I have smoked with him on one other occasion.

Q: On a train?

A: Yes.

Q: When he was the engineer?

[105] A: Yes.

Q: What did you do with the remainder that was left of the joint after you each took some hits?

A: I smoked the roach in a bowl that I had.

Q: And by bowl you mean—

A: Pipe.

Q: And what did you do after that?

A: Put the bowl in my bag and started making lunch.

* * * *

[115] A: I went back up to the north engine, the 5044, to see if Rick was okay, dead, or what was going on.

Q: And what did you find when you got up there?

A: He wasn't there and the portable radio wasn't there.

Q: So, what did you do?

A: I got my bowl out of my bag and got back down off the engine and I hid the bowl somewhere in somebody's yard. I'm not sure where. I started walking up to where the wreck was. I seen a rescue worker and they asked me if I was involved in the wreck. I said, Yes. He said, Walk out to the road and get in an ambulance.

* * * *

[125] Q: And when you went to the NTSB (National Transportation Safety Board] hearing, did you testify that you had smoked with Gates on the run?

A: No, I told them that we didn't smoke at all that day.

Q: You denied it?

A: Yes.

Q: And to your knowledge did Gates deny that also?

A: Yes.

* * * *

[130] Q: Had you ever—you had ridden before with Gates?

A: Yes. From what I know he's a good engineer, he knows all of the rules.

* * * *

APPENDIX F

Excerpt from transcript of Hearing before the Committee on Commerce, Science and Transportation, United States Senate, February 25, 1988.

[89] THE CHAIRMAN [Senator Hollings]: . . . I take it on this one occasion that you pointed to in your own testimony, where you called in and said you were not ready to go to work, they said come on in anyway and that you looked okay. Can you elaborate on that?

MR. GATES: Well, it was a clerk that called me, that is required to order me for work. At that time he was going to show me refusing duty, which would have put me under disciplinary measures at work, and also it would cause him to some hardships.

And so I told him more or less that I would show up at work if he would call the trainmaster that was on duty and tell him what condition I told him I was in. I told him I was drunk.

I told him I would have a friend of mine drive me to work because I was not capable of driving myself, and we would put it in his lap and let him decide, with no intention myself of actually having to run a train that night.

When I did show up, I stopped briefly and got a coffee and walked into the back room where the trainmaster's office was. My crew was already there with him and was aware of what to expect from me when I walked in. I was spilling the [90] coffee all over the place because I was not walking straight.

And he told me I looked okay and that another member of my crew would keep me awake during the trip.

THE CHAIRMAN: What about the attitude of the employees? That indicates to me that when you do get in trouble and know you are not in a condition, that you do you mind stating so and you do have this responsibility foremost in mind.

If you had a vote amongst the employees you have been with on random testing, would they vote aye or no?

Would they vote and say no, we do not want to have such a thing, or would they vote and really consider it good for them as well as the traveling public?

What would be your opinion?

MR. GATES: Well, I know the union's position on it. I cannot answer for the other employees. But I know for myself, I would think, based on that, others would answer similarly.

As I said before, denial is the hallmark of the disease. That is the main thing. Nobody wants to get caught. You will deny and you will lie your way out of it if at all possible, and you will do anything you can to keep from being tested positive, or to even take the test in some instances.

* * * *

[95] SENATOR DANFORTH: And have there been other cases, other than your own case, when the supervisor said, well, you are good enough to work? Do you know other cases when the supervisor had seen somebody on the job or seen somebody before he goes on the job and allowed him to proceed with his work?

MR. GATES: My case was the only one where I have experienced someone actually ordering me, knowing me and having me tell them I was intoxicated. I have been in other situations where the person I was working with, we both confronted a supervisor and we were—well, at least he was blatantly drunk, anyway, drunk enough to tell by looking and sniffing or whatever you want to do. And it was ignored.

[96] SENATOR DANFORTH: It was ignored by the supervisor?

MR. GATES: Yes, sir.

SENATOR DANFORTH: Do you think that during the 14 years you have been on the railroad that it has been a common everyday occurrence that people have operated trains while they have been impaired by alcohol or drug use?

MR. GATES: As I said before, I have not worked there in the past year, but I have no reason to believe

that anything has changed. It had slacked off for the past few years that I had worked there as far as visibility. That is why I cannot say whether some of the employees were continuing their practices or not.

But originally when I worked there, when I started working under Penn Central, it was a common everyday practice.

* * * *

[99] SENATOR EXON: Either before this tragic accident or subsequent thereto, have you known of any one of your personal acquaintances that have turned themselves in for voluntary treatment, as the rules and regulations of the [100] Federal authorities allow?

MR. GATES: I have never known anybody to turn themselves in. I have known a couple of employees that were caught and more or less forced to go in for treatment, and they are doing very successfully now.

* * * *

[143] SENATOR DANFORTH: Mr. Mann, you do not object to drug testing except random testing, is that right?

MR. MANN: That is correct. . . . The Brotherhood of Locomotive Engineers and the United Transportation Union have agreed to pre-employment, post-accident, periodic and reasonable cause.

* * * *

[147] SENATOR DANFORTH: . . . Did the court case hold that this crazy Ninth Circuit case, did it not hold that testing after an accident was unconstitutional?

MR. MANN: It did.

SENATOR DANFORTH: Do you favor testing after accidents?

[148] MR. MANN: Only if there are protections built in will the unions favor testing.

SENATOR DANFORTH: You have taken the position that you favor testing after accidents.

MR. MANN: Correct, and there is a difference—

* * * *

APPENDIX F

February 23, 1988

FEDERAL RAILROAD ADMINISTRATION
ACCIDENT INVESTIGATION UPDATE
CHESTER, PENNSYLVANIA
JANUARY 29, 1988
AMTRAK

BACKGROUND:

The accident occurred at 12:32 a.m. near Chester, Pennsylvania, when Amtrak's No. 66 (Night Owl) train—which should have been diverted to a clear track—was permitted to proceed onto a stretch of trackage occupied by a Maintenance of Way vehicle. The block tower operator who controlled the signal at the point where the Amtrak train should have been diverted fled the premises in mid-shift, immediately after the occurrence of the accident. The two locomotive units derailed and overturned. All 10 cars derailed and remained upright. The engineer and 18 passengers were injured.

CASUALTIES AND PROPERTY DAMAGE:

Nineteen people were injured. Property damage is estimated at $297,150.

POST-ACCIDENT TESTING:

Train Crew and Others: Samples were obtained from the Amtrak engineer, conductor, four assistant conductors, the train dispatcher, a signal maintainer shortly after the accident, and from the block operator on the afternoon of February 1, 1988. One assistant conductor tested positive for the marijuana metabolite in the blood (27 ng) and urine (27 ng). Tests on all other crew members were negative.

Block Operator: The accident occurred at approximately 12:32 a.m. on January 29, 1988. The block operator left his post without authorization and accordingly was not available for post-accident toxicological testing required by FRA rules. On the afternoon of February 1, 1988, three and one-half days after the accident, the block operator met with representatives of the parties to the accident investigation.

At the conclusion of that interview, the block operator was asked if he would submit to testing under the Federal regulations, and he agreed to do so. He was then taken to a medical facility where specimens were collected shortly after 4:00 p.m. The samples were sent to the Center for Human Toxicology for testing under the FRA rule.

The block operator tested positive for the following compounds: for the marijuana metabolite in the blood (8 ng/ml) and urine (89 ng/ml); for the cocaine metabolite in the urine (S1 ng/ml); and for methamphetamine (74 ng/ml) and amphetamine (48 ng/ml) (possibly present as a methabolite of methamphetamine) in the urine. Other tests for drugs and alcohol were negative.

In view of the fact that the block operator had absented himself following the accident, FRA instructed the Center to test his specimens down to the sensitivity of the particular tests to determine the smallest detectable amount consistent with the reliability of the test procedures and equipment. Since drugs and their metabolites are eliminated from the body over a period of time that differs by type of drug, frequency of use, dosage, and other factors, testing in the range below the normal "administrative detection limit" (or usual cut-off levels) extends the period during which the drug is detectable.

Attached is an excerpt from FRA's Field Manual that indicates the "general parameters" for drug detection over time. This table assumes normal screening and confirmation cut-offs higher than those employed in the subject tests.

William E. Loftus
Angela Sullivan
Federal Railroad Administration
(202) 366-0881
February 23, 1988

RESULTS OF TOXICOLOGICAL ANALYSIS—
BLOCK OPERATOR

Chester, Pa.; Amtrak; January 29, 1988
(In Nanograms (ng) (per Mililiter)

			Center for Human Toxicology (FRA)	
Drug	Blood	Urine	([1]/)	([2]/)
Marijuana metabolite	8 ng.	89 ng	(20 ng)	(20 ng)
Cocaine metabolite	neg.	81 ng	(10 ng)	(150 ng)
Methamphetamine	neg.	74 ng	(20 ng)	(100 ng)
Amphetamine [3]	neg.	48 ng	(20 ng)	(100 ng)

[1, 2] Because the tests were not performed until the fourth day after the accident, FRA requested its laboratory to test the specimens down to the sensitivity of the assays (the lowest level at which the compound can be reliably identified). The first number in parenthesis is the sensitivity of the test; the second is the administrative reporting cut-off (on confirmation) for normal reporting purposes when specimens are collected within a reasonable time after the accident. The cocaine metadolite and methamphetamine/amphetamine results would have been reported as negative under normal reporting practices.

[3] Possibly present as a metabolite of methamphetamine.